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Supreme Court of the United States

OCTOBER TERM, 1961

No. 464

**NATIONAL LABOR RELATIONS BOARD,
PETITIONER**

vs.

WASHINGTON ALUMINUM COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**PETITION FOR CERTIORARI FILED OCTOBER 2, 1961
CERTIORARI GRANTED DECEMBER 4, 1961**

Supreme Court of the United States

OCTOBER TERM, 1961

No. 464

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

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WASHINGTON ALUMINUM COMPANY

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COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

*On Petition for Enforcement of an Order of
the National Labor Relations Board*

JOINT APPENDIX—Filed October 14, 1960

[fol. 1] **BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

126 NLRB No. 162

Case No. 5-CA-1498

WASHINGTON ALUMINUM COMPANY, INC.

and

ROBERT A. HEINLE

FRANK J. ADAMS

FRANK OLSHINSKY

WARREN A. HOVIS

AUGUSTINE AFFAYROUX, SR.

WILLIAM GEORGE, JR.

J. ALFRED R. CARON

Case No. 5-RC-2682

WASHINGTON ALUMINUM COMPANY, INC.

EMPLOYER

and

INDUSTRIAL UNION OF MARINE & SHIPBUILDING

WORKERS OF AMERICA, AFL-CIO

PETITIONER

DECISION, DIRECTION AND ORDER—March 31, 1960

On September 11, 1959, Trial Examiner Louis Plost issued his Intermediate Report and on September 18, 1959, an Erratum in the above-entitled consolidated proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report and Erratum attached hereto. The Trial Examiner further found, in effect, that the challenges to certain ballots in the representation proceeding should be overruled. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the brief, and the entire record in this proceeding¹ and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modification.

The Trial Examiner found, and we agree, that the Respondent violated Section 8 (a)(1) in terminating the employment of the 7 complainants who were engaged in protected concerted activity under the Act. We rely, *inter alia*, upon the following: the credited testimony of employee Hovis that "We all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way;" the credited testimony of employees Heinlein, Caron and George as to previous complaints made to the Respondent's foremen [fol. 2] over the cold working conditions, and to the effect that the men left on the morning of January 5 in protest of the coldness at the plant; and the evidence that the 7 complainants left the shop at approximately the same time.²

Case No. 5-RC-2682

The Challenges

The Trial Examiner found that Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux, Sr., and Warren A. Hovis, whose ballots were challenged, were entitled to vote. We agree, as they were unlawfully discharged or laid off before the election and, therefore, retained their status as employees eligible to vote.

¹ The Respondent's request for oral argument is denied as the record, the exceptions and the brief adequately present the issues and the positions of the parties.

² See *Southern Silk Mills, Inc.*, 101 NLRB 1, *enf'd* 209 F. 2d 155 (C.A. 6); *Metcó Plating Co.*, 113 NLRB 204, *enf'd* 239 F. 2d 642 (C.A. 6). Cf. *Knight Morley Corp.*, 113 NLRB 204, *enf'd* 239 F. 2d 642 (C.A. 6), *cert. denied* 357 U.S. 927, involving Section 502 of the Act, which in our opinion would not be applicable in the instant case if alleged.

DIRECTION

IT IS HEREBY DIRECTED that the Regional Director for the Fifth Region shall, pursuant to the Rules and Regulations of the National Labor Relations Board, within ten (10) days from the date of this Direction, open and count the ballots of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux, Sr., and Warren A. Hovis, and thereafter prepare and cause to be served upon the parties a Supplemental Tally of Ballots, including the count of the challenged ballots, and take such further steps as may be necessary in accordance with the Board's Rules and Regulations.

ORDER

Upon the entire record in this proceeding, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby [fol. 3] orders that the Respondent, Washington Aluminum Company, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging concerted activities of its employees by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment;

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux,

Sr., William George, Jr., and J. Alfred R. Caron immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges; discharging if necessary any employees hired to replace them.

(b) Make whole said employees in the manner set forth in the section of the Intermediate Report entitled "The Remedy" for any loss of pay they may have suffered by reason of Respondent's discrimination against them;

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time [fol. 4] cards, personnel records and reports, and all other records necessary to analyze and determine the amount of back pay due;

(d) Post in conspicuous places in its plant in Baltimore, Maryland, including all places where notices to employees are customarily posted, copies of the notice attached hereto as Appendix.³ Copies of said notice to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the Regional Director for the Fifth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

Dated, Washington, D. C. March 31, 1960.

BOYD LEEDOM, *Chairman*
STEPHEN S. BEAN, *Member*
JOHN H. FANNING, *Member*
NATIONAL LABOR RELATIONS BOARD.

(SEAL)

³ In the event this Order is enforced by a decree of the United States Court of Appeals, the notices shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

6
[fol. 5]

APPENDIX TO DECISION, DIRECTION AND ORDER

**NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER**

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage concerted activity by discriminatorily discharging any of our employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any other term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer to:

**ROBERT A. HEINLEIN
FRANK J. ADAMS
FRANK OLSHINSKY
WARREN A. HOVIS
AUGUSTINE AFFAYROUX, SR.
WILLIAM GEORGE, JR.
J. ALFRED R. CARON**

immediate and full reinstatement to their former or substantially equivalent positions without prejudice to

[fol. 6] any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination, discharging if necessary any persons hired to replace them.

WASHINGTON ALUMINUM COMPANY, INC.
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

ERRATUM TO INTERMEDIATE REPORT—September 18, 1959

In the section of the Intermediate Report headed "Concluding Findings on Case No. 5-CA-1498," on page 7, lines 42, 43, and 44 of the Report in naming the discriminatees, the name of Robert A. Heinlein was inadvertently omitted. The names of the discriminatees at lines 42, 43, and 44, page 7 of the Intermediate Report are therefore corrected to include the name Robert A. Heinlein. On page 9, line 48, change No. 5-RC-1498 to read No. 5-RC-2682.

LOUIS PLOST,
Trial Examiner.

[fol. 7] **BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

Case No. 5-CA-1498

Washington Aluminum Company, Inc.

and

Robert A. Heinlein, Frank J. Adams, Frank Olshinsky,
Warren A. Hovis, Augustine Affayroux, Sr.¹, William
George, Jr., J. Alfred B. Caron.

and

Case No. 5-RC-2682

Washington Aluminum Company, Inc.
(Employer)

and

Industrial Union of Marine and Shipbuilding Workers of
America, AFL-CIO².

(Petitioner)

*Lawrence Wescott, Esq., and Bernard E. Orem, Esq., for
the General Counsel.*

*Joseph Bernstein, Esq., Robert R. Blair, Esq., Leonard
E. Cohen, Esq., all of Baltimore, Md., for the Respondent
Case No. (5-CA-1498).*

*Charles Yumkas, Esq., and Jacob Blum, Esq., of Balti-
more, Md., for the Charging Parties Case No. (5-CA-1498).*

*Mr. Jack Gerson, of Baltimore, Md., for the Petitioner
Case No. (5-RC-2682).*

Before:

Louis Plost, Trial Examiner.

¹ This Charging Party was inadvertently designated "Afferoyrux" in the Formal Documents. The correction is hereby made.

² The Union was inadvertently designated "International." The error is hereby corrected.

[fol. 8]

INTERMEDIATE REPORT

STATEMENT OF THE CASE

On February 26, 1959, a charge was formally filed in the Fifth Region of the National Labor Relations Board (Board) at Baltimore, Maryland, averring that Washington Aluminum Company, Inc., Baltimore, Maryland, (Respondent), had discriminatorily discharged certain of its employees on January 5, 1959, in violation of the National Labor Relations Act as amended. (Act)³ The matter was docketed as 5-CA-1498. Thereafter the Regional Director for the Fifth Region issued a complaint dated May 15, 1959, caused a copy thereof together with a Notice of Hearing, setting the hearing for *July 15, 1959*, to be duly served. The complaint alleged that the Respondent, by reason of the aforementioned discharges had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a)(1) and (3) and Section 2 (6) and (7) of the Act.

On May 21, 1959, the Respondent filed an answer.

The following information relating to a case docketed in the Fifth Region of the Board as Case No. 5-RC-2682 is not here reported as "findings" because it is not based on testimony adduced before the undersigned but reported as taken from the formal documents introduced at the hearing before the undersigned on *August 3-4, 1959*, and is here recited as necessary for a complete understanding of all matters to be covered by this Report.

On February 26, 1959 (the same date as the charge in Case No. 5-CA-1498 was filed) the Respondent and Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO⁴ (Union) signed a Stipulation for Certification Upon Consent Election, in the matter docketed in the Fifth Region as Case No. 5-RC-2682. The [fol. 9] formal documents do not disclose the date the

³ The employees named as having been illegally discharged were named as: "Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr. (corrected. See footnote No. 1) William George, Jr. and J. Alfred R. Caron.

⁴ This is the correct name of the Union. See footnote No. 2.

petition in 5-RC-2682 was filed. The Regional Director approved the Stipulation on March 9, 1959. On March 17, pursuant to the Stipulation an election was conducted, the vote as shown by the Tally of Ballots showed 68 votes^{*} for the Union, 70 votes against the Union and 5 challenged ballots.

No objections were filed within the time prescribed by the Board's Rules, however on March 30, the Union objected to the ruling made at the election, by the Board's agent, with respect to the validity of two ballots as marked by voters; the Regional Director treated the Union's objection as Objections to the Conduct of the Election, affecting all matters disputed at the election. He ruled on the two ballots, on the eligibility of one of the voters challenged and as to the four remaining challenged voters, whose ballots were impounded he, under date of June 11, 1959, recommended to the Board that Case No. 5-RC-2682, be consolidated for hearing with Case No. 5-CA-1498 (in which he had issued a complaint on May 15, and which was set for hearing on July 15) the consolidation was asked "solely with respect to the eligibility to vote" of the four challenged individuals who are also named as discriminatorily discharged in the complaint in Case No. 5-CA-1498, the Regional Director's Report on challenges as made to the Board stating "the eligibility to vote of these four voters depends, therefore, upon the resolution of the unfair labor practice case."

On June 30, the Board ordered a hearing before a Trial Examiner "to resolve the issues raised on the eligibility to vote of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux^{*} and Warren A. Hovis, and that such hearing be consolidated with . . . Case No. 5-CA-1498."

Pursuant to notice, a hearing was held on August 3 and 4, 1959, before Louis Plost, the duly designated Trial Examiner, at Baltimore, Maryland.

[fol. 10] The General Counsel, the Respondents and the Charging Parties (in Case No. 5-CA-1498) were all repre-

^{*} The Regional Director ruled one of the challenged ballots valid. the count stood 69 for and 70 against.

^{*} See footnote No. 2.

mented by counsel and the Union involved in Case No. 5-RC-2682 by its Regional Director.

All the parties participated and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Oral argument was presented by the General Counsel and the Respondent. A brief was received from the Respondent on August 27, 1959, and from the General Counsel August 31.

At the opening of the hearing the formal documents were introduced by the General Counsel, they consisted *inter alia* of the Complaint as issued in Case No. 5-CA-1498 and the answer filed thereto, the Board's Order for hearing Case No. 5-RC-2680 and the Order Consolidating Hearings.

No evidence was adduced except that required to sustain the allegations of the complaint in Case No. 5-CA-1498.⁷

At the close of the hearing the General Counsel moved to conform all the documents to the proof with respect to spellings, dates and like matters and to correct the errors as to the Union and Affayroux. The motion was granted. The parties argued orally. A date was set for the submission of briefs, findings of fact and/or conclusions of law.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

⁷ On August 18, 1959, the General Counsel moved to correct the transcript in certain particulars. No objections have been filed. The motion is granted and the transcript corrected as follows:

1. Page 15, line 2 insert the word "not" after the word "was" so that it reads "was not a supervisor."
2. Page 40, line 21—change the figure 80 to 8.
3. Page 60, lines 22 and 23—"We didn't stand in one spot work. We had to move around."—corrected to read "We stood in one spot and worked. We didn't move around."
4. Page 77, line 26—add the words "and get a doctor's certificate" so line 26 reads "And did you later go to the doctor and get a doctor's certificate?"
5. Page 90, line 7—change word "relied" to relayed."
6. Page 139, line 20—change the name "Caron" to "Tarrant" so that the name is "Ray Tarrant."

[fol. 11]

FINDINGS OF FACTS

Case No. 5-CA-1498

I. THE BUSINESS OF THE RESPONDENT

The complaint alleged, and the answer admitted:

Respondent is and has been at all times material herein a corporation duly organized and existing by virtue of the laws of the State of Delaware, having its principal office and place of business at Baltimore, Maryland where it is engaged in the fabrication of aluminum products.

Respondent, in the course and conduct of its business operations, as described above, during the preceding 12 months' period, a representative period, shipped goods and materials of a value in excess of \$50,000 from its Baltimore, Maryland plant direct to customers located outside the State of Maryland.

Respondent is and has been at all times material herein engaged in commerce within the meaning of Section 2, subsection (6) of the Act.

II. LABOR ORGANIZATION INVOLVED

No labor organization is alleged to be, nor was any proved to be, involved in Case No. 5-CA-1498.

The formal documents in Case No. 5-RC-2682 show the petitioning union to be Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO.*

III. THE UNFAIR LABOR PRACTICES

The discriminatory discharges

J. Alfred R. Caron testified that on January 5, 1959, he was a "leader" in the machine shop, had no authority to hire or fire employees, grant "time off" or give permission to leave the plant. Caron further testified that on Monday, January 5, 1959, he arrived for work at 7:10 a. m., [fol. 12] that the plant was very cold at the time; that he (as was his custom) went to the office of Foreman David

* See footnote No. 2.

N. Jarvis adjoining the machine shop; that he and Jarvis discussed "how cold it was and miserable"; that during the conversation two of the employees walked by the office window (which gave out into the plant) "huddled" and Jarvis observing them remarked "if those fellows had any guts at all they would go home"; that following this remark he (Caron) returned to the machine shop, noted that six of the eight men who worked there as machinists, namely the Charging Parties other than himself, were standing together "shaking a little, cold"; that he came up to them and:

I told them, I said, "Dave told me that if we had any guts at all, we would go home." And I said, "I am going home." I said, "What are you fellows going to do?"

Then they started talking among themselves saying, "Well, let's go."

And I started out first. And they were following behind me.

Caron further testified that as he was leaving he passed Jarvis to whom he said, "Dave it is too cold, I am going home."

Caron admitted he did not have permission to leave and was familiar with the standing company rule which required that permission of a foreman was required in order to leave the plant.

At about 9:30 a. m. Caron received a telephone call at his home from Jarvis who told him that on orders of *Fred N. Rushton*, the Respondent's president, the seven men who had left the plant that morning were discharged. Later in the day Caron came to the plant and removed his tool box.

Foreman Jarvis corroborated Caron's testimony with respect to Caron's conversation with him.

The six employees who followed Caron from the plant and who together with Caron are the Charging Parties herein* corroborated Caron. All testified that the plant

* Of these, Heinlein and George were called by the General Counsel. Adams, Olshinsky, Affayroux and Hovis were called as hostile witnesses by the Respondent.

[fol. 13] "was extremely cold, that they had no permission to leave and that they knew it was forbidden by plant rules to leave the plant without a foreman's permission. All testified that they left the plant after Caron talked to them and after they had discussed the matter among themselves.

On direct examination as a hostile witness by the Respondent, Employee *Warren A. Hovis*, testified:

Q. (By Mr. Bair) Now, why did you leave the plant on Monday morning with these other men?

A. Well, they said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way.

There can be no doubt whatever on the record herein that on January 5, the Respondent's plant was somewhat colder than usual.

William George, Jr., testified that when he arrived for work on January 5, he found that ice had formed on the drain pipe of the spot-welder he operated in the machine shop.

Wilhelm Tafelmair, the one machinist who did not leave the plant with the other seven, testified that he worked in the machine shop, after the others left, wearing his overcoat, which he had put on at the suggestion of Foreman *Jarvis* and wore it at work until about 10:30 a. m.

Foreman *Jarvis* testified that when he arrived January 5, the plant was "extremely cold" and that the main furnace heating the plant was not operating; that at about 7:15 a. m. the plant's maintenance man arrived and got the furnace into operation but that "it was after lunch time" before the men then working in the machine shop could take off the excess clothing "bundling them up."

Vincent Battaglia, the Respondent's night watchman, testified that the heat in the plant was customarily shut off during the night and that he turned it on at 5 a. m.; that at 1 a. m. Sunday night the "big furnace" would not [fol. 14] operate, nor could he get it into operation at 5 a. m. when he again tried; that he reported this in the

morning to the maintenance man when he arrived who then "started working on the furnace."

Roy V. Rose, the Respondent's maintenance man testified that on January 5, at 7:15 a. m. he was informed that the furnace was not operating but that he had it repaired and operating within "15 or 20 minutes." Rose testified further that it would require $2\frac{1}{2}$ to $3\frac{1}{2}$ hours for the furnace to warm an area within a 50 foot radius of it after it began operating.

Apparently unusually cold weather was expected for Monday. Fred N. Rushton, the Respondent's president testified he visited the plant at 10 p. m. Sunday, January 4, because:

I had to talk to the watchman to make sure we get the heat on and see that things are as good as we can get them and normal. Certainly you want to have a warm shop. Plus the fact that we have pipes in there that may break if we are not careful.

Foreman Jarvis testified that at "say 8:30" a. m. President Rushton arrived at the plant; that he reported to Rushton that the seven machinists had left in a body due to the cold; that Rushton ordered the discharge of the seven men who had left the plant. Jarvis, however, testified that a meeting of supervision was first held in Plant Manager Raymond Tarrant's office where he was told by Rushton to make the discharges for the reason:

That they had left the premises unauthorized. And this curtailed our operation. And this they were discharged for.

Jarvis further testified that at "around nine o'clock" Affayroux returned to the plant, told him he had only gone for coffee and asked to be returned to work but that he told Affayroux he had already been discharged on President Rushton's orders; that following this conversation [fol. 15] he telephoned to those of the seven men who had telephones and sent telegrams to the others informing them they were discharged.

The discharges according to Foreman Jarvis were all made before any replacements were hired to replace the seven men.¹⁰

Arthur Wampler, the Respondent's general foreman testified that he took part in the discussion to discharge the seven employees; that the decision was made "between 9 and 9:30 by myself, Mr. Jarvis and Mr. Rushton" and that the men were discharged "for violating plant rules, leaving the plant without permission, and to maintain discipline." However, Wampler admitted that his three assigned reasons were really but one, namely, "leaving the plant without permission."

President *Fred N. Rushton* testified that he arrived at the plant January 5, at 8:20 a. m. and was told by Jarvis that the machinists had "walked off"; that he then told Jarvis "Dave, if they have all gone, we are going to terminate them," that he met with Jarvis and Tarrant, decided what action to take, and that he issued instructions to discharge the men before he left at 9 a. m. Rushton testified:

Q. (By Mr. Bair) What were your own reasons for making the decision to terminate these men?

(The Witness) The real reason is because they didn't inform the foreman of the action they were taking.

The undersigned is persuaded on all the evidence considered as a whole and from his observation of the witnesses that Rushton's testimony that "the real reason is because they didn't inform the foreman of the action they were taking" is merely the statement of an afterthought. [fol. 16] It is clear that the seven men who walked out as a group in protest of their working conditions were engaged in concerted activity protected by the Act,¹¹ the

¹⁰ Telegrams dated January 5, 1959, were sent to Olshinsky, Adams, George and Hovis. Telephoned discharges were to Heinlein, Adams and Caron. Affayroux was personally notified.

¹¹ The General Counsel might well have raised a very interesting point of law had the complaint been drawn under Section 502.

fact that they were discharged before they had an opportunity to formally elect a committee to deal with the Respondent with respect to the adjustment of their grievance (as argued by the Respondent) is of no moment.

The men were in reality discharged very soon after 8:20 a. m., Monday, January 5, 1959, by the men who had full authority to do so. *Rushton*, the official who is referred to, testified:

And I came back in the shop. And when I came back in B shop again I noticed all the people were out of the shop.

So Dave Jarvis was there. And I said, "Dave, where is everybody?"

He said, "They have all walked off."

I said, "We can't have that, Dave."

"Well," he said, "they have all gone."

I said, "Dave, if they have all gone, we are going to terminate them."

The complaint alleges and the undersigned agrees that the evidence fully proves that:

On or about January 5, 1959, Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, William George, Jr., and J. Alfred R. Caron, Respondent's employees, did engage in a strike or concerted refusal in the course of their employment to perform any services for Respondent in protest of certain working conditions, to wit, the failure of Respondent to supply adequate heat in their place of employment.

[fol. 17] On the entire record considered as a whole the undersigned finds therefore that the seven men (the Charging Parties herein) on January 5, 1959, by their concerted activity as found herein, became and were economic strikers. The undersigned further finds that by reason of their being discharged *before they were replaced*, they continued to so remain and were therefore unlawfully discharged employees, and as such are entitled to all the rights and privileges of economic strikers.

**CONCLUDING FINDINGS ON
CASE No. 5-CA-1498**

On all the evidence considered as a whole and from his observation of the witnesses, the undersigned finds that by the discharge of Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr., William George, Jr., and J. Alfred R. Caron as herein found, the Respondent did discriminate and is discriminating in regard to the hire and tenure and terms and conditions of employment of the employees named above, thereby discouraging concerted activity and did thereby engage in and is engaging in unfair labor practices within the meaning of the Act. The undersigned further finds that by such conduct the Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8 (a)(1) of the Act.

**IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES
UPON COMMERCE**

The Respondent's activities, set forth in Section III, above, occurring in connection with the Respondent's operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[fol. 18]

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has discriminated in regard to the hire and tenure of employment of the hereinabove named employees it will be recommended that the Respondent offer them immediate and full re-

instatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and that each be made whole for any loss of pay he may have suffered by reason of the discrimination, by payment to him of a sum of money equal to that which he would normally have earned as wages from the date of the discrimination to the date of the Respondent's offer of reinstatement, less his net earnings during such period.¹² The backpay shall be computed in the manner established by the Board.¹³ The Respondent shall make available to the Board its payroll and other records to facilitate the checking of amounts due.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Respondent, Washington Aluminum Company, Inc., Baltimore, Maryland, is engaged in commerce within the meaning of the Act.

2. By discriminating in the hire and tenure of employment of Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr., William George, Jr., and J. Alfred R. Caron, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of the Act, and by such [fol. 19] discrimination is thereby interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case,

¹² Crossett Lumber Company, 8 NLRB 440.

¹³ F. W. Woolworth Company, 90 NLRB 118.

the undersigned recommends that the Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging concerted activities of its employees by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment;

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr., William George, Jr., and J. Alfred R. Caron, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority [fol. 20] or other rights and privileges; discharging any employees hired to replace them if this is necessary;

(b) Make whole said employees in the manner set forth in the section of this Report entitled "The Remedy" for any loss of pay they may have suffered by reason of Respondent's discrimination against them;

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due;

(d) Post at its plant in Baltimore, Maryland, copies of the notice attached hereto and marked "Appendix." Copies of said notices to be furnished by the Regional Director of the Fifth Region shall, after being duly signed by the Respondent or its representatives, be posted by

the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not affected, defaced, or covered by any other material;

(e) Notify the Regional Director for the Fifth Region in writing within twenty (20) days from the date of receipt of this Intermediate Report what steps the Respondent has taken to comply herewith.

Case No. 5-RC-2682

The Board on June 30, 1959, having issued an Order Directing Hearing in Case No. 5-RC-2682 upon the issues raised on the eligibility to vote of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux, Sr., and Warren Hovis, and directed that such hearing be consolidated with the hearing in the Complaint issued in Case No. 5-CA-1498 solely with respect to such eligibility and the undersigned having found on all the evidence adduced at the consolidated hearing in Case No. 5-CA-1498 and Case No. [fol. 21] 5-RC-1498 consolidated that the aforesaid Heinlein, Olshinsky, Affayroux, Sr., and Hovis were, among others, employees of the Respondent on January 5, 1959, and have continued to be employees of the Respondent in the status of economic strikers, the undersigned further finds that said striking employees enjoyed the full rights of employees of the Respondent, including the right to vote within an appropriate unit for the determination of a representative for collective bargaining on March 17, 1959.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report, the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

Dated at Washington, D. C., this day of September 1959.

LOUIS PLOST,
Trial Examiner.

APPENDIX TO INTERMEDIATE REPORT**NOTICE TO ALL EMPLOYEES****PURSUANT TO****THE RECOMMENDATIONS OF A TRIAL EXAMINER**

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities [fol. 22] except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a)(3) of the Act.

WE WILL NOT discourage such concerted activity by discriminatorily discharging any of our employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any other term or condition of employment.

WE WILL offer to:

ROBERT A. HEINLEIN
FRANK J. ADAMS
FRANK OLSHINSKY
WARREN A. HOVIS
AUGUSTINE AFFAYROUX, SR.
WILLIAM GEORGE, JR.
J. ALFRED R. CARON

immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay

suffered as a result of the discrimination, discharging any persons hired to replace them if necessary.

WASHINGTON ALUMINUM COMPANY, INC.
(Employer)

Dated By
(President)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 23] **BEFORE THE
NATIONAL LABOR RELATIONS BOARD.**

TRANSCRIPT OF PROCEEDINGS

(Trial Examiner Plost) The hearing will be in order.

This is a formal hearing before the National Labor Relations Board, in the Matter of Washington Aluminum Company, Inc., and Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, William George, Jr., J. Alfred R. Caron, Case No. G-CA-1498.

The Trial Examiner conducting the hearing is Louis Plost.

APPEARANCES

Will Counsel and other representatives of the parties please put their names into the record. And when you announce your name, please announce your office number.

The General Counsel, please.

(Mr. Wescott) Counsel for the General Counsel, Lawrence S. Wescott and Bernard E. Orem.

(Trial Examiner) And who is appearing for the Respondent.

(Mr. Bernstein) Joseph Bernstein, 1508 First National Bank Building.

(Mr. Bair) Robert R. Bair, 1409 Mercantile Trust Building.

(Mr. Cohen) Leonard E. Cohen, 1508 First National Bank Building.

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(Mr. Wescott) It has been stipulated by the parties that the Washington Aluminum Company, Inc., is a company doing interstate commerce—doing business in interstate commerce and during the past 12 months period has shipped in excess of \$50,000 from points inside the State of Maryland to points in the various states of the United States.

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J. ALFRED R. CARON

called as a witness and, having been first duly sworn, was examined and testified as follows:

[fol. 24]

DIRECT EXAMINATION

Q. (By Mr. Wescott) Would you state your name and address please? A. My name is J. Alfred R. Caron. I live at 923 Imperial Court, Baltimore 27.

Q. Were you ever employed by Washington Aluminum Company? A. Yes, sir.

Q. What were your dates of employment? A. I went to work for them in March of 1957 until October of 1957. And then I came back in December of 1957 until January of 1959.

Q. And what was your job there, Mr. Caron? A. I was a leader in the machine shop.

(Mr. Wescott) At this time, Gentlemen, I am wondering if we can stipulate that during Mr. Caron's employment he was not a supervisor within the meaning of the Act?

Can that be so stipulated?

(Mr. Bernstein) Yes, it can.

(Trial Examiner) Thank you.

Q. (By Mr. Wescott) Now, Mr. Caron, what did your job involve? What did you do? A. I used to get the men started on the machines, allot the work to them, and make sure they got the hardest jobs out on time, and to help them on the machines.

• • • • •

Q. Now, Mr. Caron, during your employment there as leader, did you ever give the men any time off at all? A. No, sir.

Q. What did the men do when they wanted time off? A. They went to see the foreman Dave Jarvis.

• • • • •

Q. Now, what type of heating did the building have, Mr. Caron? A. We had an oil-fired furnace in "A" shop, and in one corner of the machine shop near the window we had an overhead gas heater.

[fol. 25] Q. On the floor plan, General Counsel's Exhibit 3, the oil-fired furnace or heater that you are referring to, is that marked "Bravo Space Heater"? A. Yes, sir.

Q. And that was approximately behind the foreman's or a little to the right of the foreman's office? A. Yes, sir.

Q. In the machine shop? A. Yes, sir.

Q. The heater that you are referring to in the machine shop, gas heater, is that the one up in the corner over the "M" in the words Machine Shop? A. Yes, sir.

Q. Was that the only heater in the machine shop? A. Yes, sir.

Q. What about down in the next part of "B" shop there, what is that? A. Well the machine shop ended where that aisle goes all the way through the three shops. And they had one hanging on the ceiling also.

Q. Which way was that facing? A. The same way the arrow points.

Q. They were both facing down the shop, is that correct? A. That is right.

Q. Were those two heaters independently operated of the large Bravo Space Heater? A. Yes. One was oil. Those other two are gas-fired.

. . . .

Q. (By Mr. Wescott) During the winter time, what was the general condition of the machine shop? A. When we came in to work in the morning it was always quite cold on cold days.

Q. What do you mean by "quite cold"? A. Well a lot of men worked with their heavy sweaters on or jackets.

Q. I see.

Did you ever make any complaints to anybody concerning that? A. I used to talk to Dave that it was cold and miserable.

[fol. 26] Q. By "Dave" you mean who? A. Dave Jarvis, the foreman.

(Trial Examiner) On what day was this, now?

(The Witness) Not any special day. On cold days.

(Trial Examiner) On cold days. Any cold day?

(The Witness) Yes, sir.

Q. (By Mr. Wescott) Can you think of any specific day that you complained? A. I think we had a cold spell two weeks prior to the day that—prior to that Monday, the 5th. And we were all complaining then that it was cold.

Q. What was the nature of your complaint? A. Well it was cold and miserable and we used to talk and tell them,

you know, how cold it was in there, and they should get more heat for us.

Q. I see.

Did you ever complain to any other company official?

A. No, sir.

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Q. (By Mr. Wescott) Calling your attention to January 5, 1959, did you report to the plant for work on that date?

A. Yes, sir.

Q. At what time did you arrive? A. Around 7:10.

Q. What was the normal starting time? 7:30.

Q. What was the condition of the plant when you arrived? A. It was very cold.

Q. What did you do when you arrived? A. I went into the office, into the office of the machine shop.

Q. By the office, whose office are you referring to? A. Dave Jarvis's office.

Q. The foreman's office? A. Yes, the foreman.

(Mr. Wescott) Can we stipulate here that Mr. Jarvis is a supervisor within the meaning of the Act?

[fol. 27] (Mr. Bernstein) No. We can stipulate he is a foreman.

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(Mr. Wescott) We stipulate that Dave Jarvis is a foreman.

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Q. Will you tell us as best you can remember what conversations took place between you and Mr. Jarvis?

A. Well, normally we sat in the office to get heat, because we had the windows knocked out of the walls so that heat would come in the office. That morning there was no heat in there. Dave and I was talking about how cold it was, and miserable. And a couple of the fellows walked by the window. It was a glass window. And they, they were huddled. He looked up to me and said, "If those fellows had any guts at all, they would go home."

Then we talked a little bit about the coldness. And he left for the offices near the entrance to the plant here, the shop offices.

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Q. What did you do after Mr. Jarvis left? A. Well, the buzzer sounded for work to begin. And I went out in the shop. And all the fellows were standing around—

Q. Excuse me. By "all the fellows" who do you mean? A. Bill George, Bob Heinlein, Warren Hovis, Frank Olshinsky and Augustine Affayroux.

Q. Did you have any conversation with them? A. Yes, sir. Nobody had moved to do anything yet. They were all huddled there, shaking a little, cold. And I told them, I said "Well, Dave told me if we had any guts, we would go home."

And I said, "I am going home, it is too damned cold to work." And I left.

Q. Did you have any other conversation with these men? A. I asked them what they were going to do. They said—they all started picking up their lunch pails and the thermos bottles. So then I started walking out.

. . . .

[fol. 28] Q. Did you see Dave Jarvis at the time you started walking out? A. Yes, I met him about half-way, here near the time clock. He was coming back towards the office, towards the machine shop.

. . . .

Q. Did you have any conversation with him at that time? A. I told him, I said, "Dave, it is too cold, I am going home."

He used to call me Babe. He said, "I will see you tomorrow Babe."

. . . .

Q. What did you do then? A. I punched out and went home.

Q. Was anybody with you at the time? A. I was alone, sir.

Q. Were any of the other men—where were the other men? A. They were coming out of the machine shop into "A" shop on their way out.

. . . .

Q. Were you the first man to leave the machine shop? A. Yes, sir.

. . . .

(Mr. Bernstein) I object. Just a minute. I think it is in order for him to ask him what he said to him; whether he asked him whether he could leave. He is asking for conclusions.

(Trial Examiner) Do it the correct way. Ask him what the conversation was, if there was a conversation.

Q. (By Mr. Wescott) Was that the only conversation that you had with Mr. Jarvis that day that you have related to us? A. Yes, sir.

Q. Now, you say you left and went home; is that correct? A. Yes, sir.

Q. Did you receive any communication from the company that day? A. Yes, sir.

[fol. 29] Q. What type of communication? A. I got a phone call.

Q. Who from? A. From Dave Jarvis.

Q. Approximately what time? A. Approximately 9:30 I would say.

Q. That is a. m.? A. A. M., sir

Q. And will you tell us of the conversation as best you can remember it on the phone? What you said and what he said? A. My wife said, "Somebody is on the phone." I went to the phone. He said, "Hello." I said "Hello." He said, "This is Dave." I said, "Don't say a word, Dave. I know we have all been fired."

He acted surprised as if somebody had called me up already and told me we had been fired. He asked me had somebody told me? I said, "No, I just felt it." He said, "That is the truth," the old man, Mr. Rushton, came through the shop and asked Dave where we all were. He said, we went home because we said it was too cold. And he said, we were all fired.

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Q. Did you return to the plant that day? A. Yes, sir.

Q. What happened when you returned to the plant? A. When I came back, Dave was running around trying to—he was trying to see Mr. Rushton or somebody to see if he couldn't get us back to work. And he told me to hang around.

And he said he would see what he could do.

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Q. (By Mr. Wescott) Continue, Mr. Caron. A. So then I told him that I had a family to support and I just couldn't afford to hang around. He asked me to hang around for a couple of days, you know, and I would probably get my job back. So we checked out my tool box together. And then I left the plant.

Q. Now, Mr. Caron, going back to when you came out of the shop, or the foreman's office, rather, into the machine shop—

[fol. 30] Q. (By Wescott)—did you have a conversation with the men? A. Yes, sir.

Q. Now, would you relate that again, please? A. I came out of the machine shop after the whistle had blown. And all the men were milling around. And usually their boxes are open and they are ready to go to work. This morning they weren't. And I came out, and I was pretty well peeved. I told them, I said, "Dave told me that if we had any guts at all, we would go home." And I said, "I am going home." I said, "What are you fellows going to do?"

Then they started talking among themselves saying, "Well, let's go."

And I started out first. And they were following behind me.

CROSS-EXAMINATION

Q. Was this particular morning in the plant colder than other Monday mornings in the plant? A. In the winter time, on cold days, it was just cold, you know. I can't say one way or the other. It was just cold.

Q. Was it colder than the Monday preceding this particular Monday? A. I don't remember.

Q. Would you change your testimony if I told you that General Counsel's Exhibit 2 shows that on this Monday morning the 7:00 o'clock temperature was 16 degrees, with a wind of 13 knots? Would that change your testimony

any? A. No, it wouldn't. I just know it was cold. That is all.

Q. And at 8:00 o'clock the temperature was 15 degrees with a wind of 18 knots. Would that change your testimony? A. In which way? That it was colder?

Q. That this particular Monday was colder than other [fol. 31] Mondays? A. No. All I have to say is that it was cold. I can't say it was colder or not.

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Q. Now, were the gas space heaters functioning on this particular morning, January 5? A. I can't truthfully say that they were.

Q. You don't know whether or not they were operating? A. I can't say, no. I didn't check to see.

.

Q. Was this furnace operating on this particular morning? A. It was blowing cold air.

Q. It was blowing cold air on this morning? A. Yes, sir.

Q. You would say then that the fan was working but not the burner? A. I don't know. Maybe it was so cold that—I couldn't say that either because I didn't check the furnace. But I know we weren't getting any heat.

Q. You didn't check the furnace? A. No, it wasn't my job.

Q. Did you ask anybody whether the furnace was being attended to? A. No.

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Q. Did you complain to him that the furnace wasn't working? A. No, I just told him it was cold. I couldn't complain because I didn't know if it was working or not.

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Q. Yes, Now, you didn't stop to look into the question of how long it would take to get hot air coming out of this furnace rather than cold air, did you? A. No, sir.

Q. You didn't make any inquiry as to whether the furnace was being fixed or not? A. That wasn't my job.

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Q. Are you familiar with the company rules that ordi-

narily require permission of the foreman to leave the plant? A. Yes. You are supposed to ask for time off.

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[fol. 32] Q. (By Mr. Bair) Did you have permission to leave the plant on this day? A. No, sir.

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Q. (By Mr. Bair) How many men work in the machine shop for the company? A. We were eight fellows on day shift, including myself, I think it was; and I think we had four or five on night shift on the second shift.

Q. And seven out of the eight fellows left on this particular morning, did they not? A. Yes, sir.

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ROBERT A. HEINLEIN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

.

Q. Did you ever work for Washington Aluminum Company? A. Yes, sir, I did.

Q. When. A. I think it was August of 1953 until January 5, 1959.

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Q. Have you ever made any complaint to any supervisor in regard to the heating? A. I have frequently on occasion remarked to Mr. Rushton as he went through the building, and also to Mr. Esender, and I think to Bill Campbell.

Q. Who is Mr. Esender? A. I think at the time he was production manager. And also to Bill Campbell when he was production manager. I always got the answer that if you worked a little bit harder, you wouldn't get cold. That was the answer I got.

Q. Can you remember any specific date or time that you spoke to him? A. No specific time, no, I can't.

Q. What time did you arrive at the plant on January 5, 1959? A. 7:20.

[fol. 33] Q. What was the condition of the plant when you arrived? A. It seemed very cold to me.

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Q. (By Mr. Orem) What did you do after you changed your clothes? A. I walked out in the shop. As I walked into the machine shop I met Mr. Hovis and Joe Caron standing in the doorway. That wasn't normal because they were usually at their machines. I asked them what was wrong. Joe Caron said, "Well, Dave said that if the men had any guts we would all go home."

I said, "What are you going to do?" He said, "I am going home."

I said, "It is all right with me, I am going home too."

.

I turned and went back in and changed my clothes.

Q. Did you see Mr. Jarvis before you left the building? A. After I changed my clothes I came out of the locker room. I went back to pick my lunch up on the table there, and Dave was walking out from the office towards me. And I said to him, "Dave," I said, "aren't you going with us?" I said, "It is too cold to work." He said, "You know I can't do that."

.

Q. Did anyone give you permission to leave? A. Nobody did give me permission.

Q. Did you receive any communication from the company that day? A. About ten-thirty that same morning Dave Jarvis called me up.

Q. What was the extent of the conversation, sir? A. I answered the phone. He said, "Bob, I have got bad news for you." I said, "What is that?" He said, "Well, the old man said you are supposed to come and pick up your tools and paycheck. You have been fired."

I said, "All right, I will be down in about an hour."

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[fol. 34]

CROSS-EXAMINATION

Q. (By Mr. Bair) What days did you speak to Mr. Rushton about the cold? A. Well, I couldn't say what day. It may have been two or three times during the six months

before that. Maybe a year before that. Maybe two years. It was always exceptionally cold—it was always cold in the winter time.

Q. Was this in Mr. Rushton's office? A. No. As he was walking through the plant.

Q. By your machine? A. Yes, sir.

Q. How about Mr. Esender? A. Yes. He was out in the shop often.

Q. The same thing two or three times? A. Yes.

Q. How about Mr. Campbell? A. When he was producing manager, I complained to him too.

Q. About— A. About not enough heat, that is right.

. . . .

Q. Did this particular Monday appear to you to be colder than other Mondays in the plant? A. It did to me.

Q. It did? A. It certainly did.

Q. Did you investigate as to any reasons why it was colder? A. I did not, no.

Q. Do you know whether or not the gas heaters in the machine shop were working that morning? A. I couldn't say if they were working or not.

Q. Do you know whether or not the furnace in the "A" shop was operating that morning? A. I could hear it running. I know it was running. Whether or not it was putting out heat I don't know.

Q. You didn't check to see if it was putting out heat? A. It wasn't my job to check the heating system.

. . . .

[fol. 35] Q. Did you ask for permission to go home? A. No, I didn't.

. . . .

Q. (By Mr. Bair) Did you say anything to Mr. Jarvis like "I will see you tomorrow."? A. No, I didn't.

Q. Were you going to come back to work the next day? A. Oh, yes, certainly.

. . . .

Q. Did you realize you had to have the permission of your foreman to leave the shop that morning? A. If we did, we always had to ask the foreman.

Q. If you wanted to take a vacation you asked the foreman, didn't you? A. Yes.

Q. If you were ill and wanted to leave, you would ask the foreman for permission to go? A. Yes.

. . . .

WILLIAM GEORGE, JR.

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

. . . .

Q. Were you ever employed by Washington Aluminum Company, Mr. George? A. Yes, sir.

Q. When were you employed there? A. From January of 1957 to January of 1959.

Q. What was your job with Washington Aluminum? A. Spot weld operator.

. . . .

Q. And during the winter time, had you made any specific complaints to any particular supervisor?

. . . .

(The Witness) Yes, sir.

[fol. 36] Q. (By Mr. Wescott) Who did you complain to? A. Mr. Esender and Mr. Jarvis.

Q. Can you recall any specific time that you complained to Mr. Jarvis? A. On several of the cold mornings I asked Mr. Jarvis why the large furnace wouldn't put out more heat?

Q. Now, on January 5, what time did you arrive at the plant? A. Approximately around 7:20; somewhere in there.

Q. What was the condition of the shop when you arrived? A. It was cold.

Q. What did you do when you arrived? A. Well, I came in, punched my time clock, walked over to the spot welder, and walked around it. I noticed an icicle was at the drain pipe. The spot welder is a water-cooled machine. I noticed there was a small icicle at the drain pipe. So I

flicked it off; walked on behind the machine and looked around, and came on out in front of it.

. . . .

And did you leave with the rest of the men in the shop?

A. Yes, sir.

Q. On that morning? A. I did.

Q. You have heard the testimony that went on here. Was the condition of your leaving substantially the same as the rest of the men? A. Yes, sir.

Q. And were you notified—or how did you find out that you were terminated? A. I came back to work the next morning. I punched in. I walked into the shop. Mr. Jarvis asked me what I was doing. I told him I had come back to work. He said, Well, I am sorry, Mr. Rushton had got mad about us leaving. That was Monday. And he had said to fire us all.

. . . .

[fol. 37]

CROSS-EXAMINATION

. . . .

Q. (By Mr. Bair) Was this Monday morning, January 5, colder than other Monday mornings in the plant, in the machine shop? A. Yes.

. . . .

Q. (By Mr. Bair) All right. Did you know whether or not the furnace in "A" shop, the big furnace, was operating that Monday morning when you left the plant?

. . . .

A. No, sir, I did not know.

. . . .

Q. Now, when you came back the next morning and found that you had been discharged, did you go to anybody and discuss the matter of your discharge? A. No, sir.

Q. Anybody in the company? A. No, sir.

Q. You didn't talk to Mr. Jarvis? A. I asked Dave what had happened. And he said that Mr. Rushton had got mad about us walking out that Monday. So I told him, well—I said, well, can anything be done? He said, no, not

at the present. Mr. Rushton was mad and didn't want to discuss it.

I said, well, if that is his attitude, there is nothing I can do, check me out.

Q. Did you have permission to leave that Monday morning? A. No, sir.

.

Q. Did you hear the statement made by Mr. Caron that Mr. Jarvis said if you men had any guts, you would go home? Did you hear that statement made? A. On two occasions, yes.

Q. Did you go home because that statement was made?

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(Trial Examiner) You can answer the question yes or no. Did you go home because Jarvis had said—had made that statement or did you go home for some other reason? [fol. 38] (The Witness) I went home for both reasons.

.

Q. (By Mr. Bair) What was the other reason? A. For it being so cold in the shop.

Q. There were two reasons why you left, then? A. Yes, sir.

.

(Mr. Bernstein) If Your Honor please, the witnesses we are about to call will be hostile witnesses.

(Trial Examiner) All right. You may call them as hostile witnesses.

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FRANK J. ADAMS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

.

Q. Were you employed by Washington Aluminum Company on January 5, 1959? A. Yes.

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Q. This was a very cold Monday morning, was it not, January 5, 1959? A. Yes.

Q. The winds were blowing very fiercely, weren't they?

A. Yes, the winds were blowing.

Q. And is this shop an insulated shop?

A. No, it is not insulated.

Q. It has a lot of window space in it and plenty of doors to the outside? A. Yes.

Q. These doors are opened in the course of the company's business, aren't they, during the morning? A. Yes.

Q. And was this particular Monday morning a colder [fol. 39] morning than other Monday mornings, inside the machine shop? A. Yes.

A. Yes.

Q. Did you notice whether or not the furnace was operating on this particular Monday morning? A. No, I couldn't say whether it was running or whether it was off.

Q. Did you take the trouble to find out whether it was running or whether it was being repaired or anything of that sort? A. No.

Q. Now, what exactly did Mr. Caron tell you when you were huddled with this group of men? A. He just came out of the machine shop office there and he said Dave, said, if any of you fellows had any guts you wouldn't work in here today.

Q. Was that the reason you went home? A. Yes.

Q. Were there any other reasons why you went home that day? A. Yes.

Q. What were they? A. Well, I was running a fever and I was pretty sick that morning.

Q. And did you later go to the doctor and get a doctor's certificate? A. Yes.

Q. And present that to the company? A. Yes.

Q. (By Mr. Bair) Did you have permission to leave that morning? A. No.

Q. Did you during the course of your employment—were you aware that you had to have permission of a foreman to take time off? A. Oh, yes.

. . . .

CROSS-EXAMINATION

. . . .

Q. Did you talk with the rest of the men? A. I talked to Caron and Hovis, Heinlein and Olshinsky.

Q. When did you decide to go home? A. Well, when Caron came out of the office there saying that—saying [fol. 40] what Dave said, that if we had any guts we would go home.

Q. And did you walk out with the rest of men? A. I walked out.

Q. Did you discuss this with the rest of the men? A. Oh, yes.

. . . .

FRANK A. OLSHINSKY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

. . . .

Q. Now, were you employed by Washington Aluminum Company on January 5, 1959? A. Right.

. . . .

Q. Now on this Monday morning, was this an extremely cold Monday morning, and was the wind blowing? A. It was a very cold morning.

Q. And was the interior of the plant colder than other Monday mornings to the best of your recollection? A. It was colder than other mornings, yes.

Q. Did you know whether the furnace was operating on this morning? A. I don't know.

Q. Did you take any trouble to find out? Did you investigate whether it was running? A. No, I didn't.

. . . .

Q. Now, will you confirm what has been said here as to the statement made by Mr. Caron to you as to what Mr. Jarvis said? A. Right.

Q. Did you leave for that reason? A. Two reasons.

Q. What were your two reasons, sir? A. That was one of them. The other one was that it was exceptionally cold in there.

Q. Did you have permission to leave on that morning? A. No, sir.

Q. Did you think you had permission to leave? A. No, sir.

Q. You did not? A. No, sir.

[fol. 41] Q. Did you know that you had to have the permission of the foreman to leave the plant? A. Yes, sir.

Q. Did you testify before the State of Maryland, Department of Employment Security Board in connection with an unemployment compensation claim? A. Yes, sir.

Q. And you testified on April 6, 1959; is that about right? A. Right.

. . . .

Q. Now, did you or did you not testify before this Appeals Referee that the leader of the machine shop told the employees that they could go home because it was too cold to work in the shop? A. No, sir.

. . . .

Q. Now, did you or did you not testify before the Appeals Referee that you were of the opinion that the leader had authority to permit you to go home? A. That was an opinion that if Mr. Jarvis wasn't there that he could give you permission to go home.

Q. In other words, you thought at that time that if Mr. Jarvis was not there, that Caron had authority to allow you to go home?

. . . .

Q. Didn't you so testify before this Maryland Board that in your opinion Caron had authority to allow you

to go home? A. Well, like I said, that if Mr. Jarvis wasn't there, that I imagine that he would have the authority to let you go home, if you were sick or something like that.

Q. And did you so testify at the Board hearing? A. I believe along that line, yes.

Q. Now, did you think on this particular morning that Caron had authority to allow you to go home? A. Mr. Caron that morning was not given authority. He was only repeating Dave's remarks as to the men having guts to go home. And we just felt that we had enough guts to go home.

Q. Were you taking up a dare more or less, then, or [fol. 42] suggestion? A. It was no dare. It was the plain fact that if we would have stayed we would have been damned fools.

. . . .

(Trial Examiner) On the record.

Have you gentlemen arrived at a stipulation that will cover the statements before the Unemployment Compensation Board of the State of Maryland?

. . . .

(Mr. Bair) It is stipulated between the parties that Frank Olshinsky appeared before an Appeals Referee of the Maryland Department of Employment Security on April 6, 1959 and testified that it was customary to take orders from the leader, and that he was of the opinion that the leader had the authority to permit them to go home.

(Trial Examiner) Does the General Counsel join in that stipulation?

(Mr. Wescott) I will so stipulate.

. . . .

AUGUSTINE W. APPAYROUX

was called as a witness and, having been first duly sworn, was examined and testified as follows:

. . . .

DIRECT EXAMINATION

Q. Now, was this morning of January 5, 1959 a colder Monday morning inside the plant than other Monday mornings? A. To my feeling and knowledge it was, yes.

Q. And was the furnace operating on this particular morning to your knowledge? A. Which one.

Q. The large furnace in "A" shop? A. It was not.

[fol. 43] Q. Did you talk to anybody in management including your foreman as to the steps being made by the company to put this furnace back into operation?

A. No.

Q. For what reasons did you leave the shop on that morning?

(The Witness) The reason I left it was too cold for one thing. And I stopped when the men went out.

Q. (By Mr. Bair) What? A. I went out with the men. I stuck with the men. When they went out I went out.

Q. Did you have permission that morning to leave? A. I did not.

Q. Did you leave as a result of this statement that Caron relayed on to you men? A. That statement came to me two ways. It came to me that it was too cold for him to work. But he had to stay there. And I figured if it was too cold for him, it is too cold for me. I went home.

Q. You left as a result of that statement? A. That is right.

Q. Now, did you testify before the Maryland Department of Employment Security on April 6th of this year?

No, I beg your pardon.

It was February 24 of this year. Did you testify before the Unemployment Compensation Board?

Q. Did you testify there? A. Yes, I testified.

Q. And did you state at those hearings the following:

"The leader of the machine shop stated that the foreman had said that it was too cold to work and we would be fools if we did not go home."

[fol. 44] Did you make that statement or did you not?

A. I think I put "damned fools" in there. I am most sure I did.

Q. All right. But otherwise you made that statement?

A. Yes.

Q. Now, did you testify as follows:

"That as a result of this statement by the leader you left the job along with the other men?"

A. That is right.

Q. Did you also testify that you went to a nearby diner to get some coffee? A. I did.

Q. Did you return to work after going to that diner that morning? A. I came back, yes.

.

Q. Did you know that you needed the permission of the foreman to leave the plant? A. I did.

Q. Did you leave without permission on that morning? A. I did.

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WARREN H. HOVIS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

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Q. Now, on Monday morning, January 5th, was this a colder Monday morning inside the plant where you worked than on other Monday mornings? A. It seemed to me like it was extremely cold.

Q. And did you find out why it was cold?

Was the furnace in "A" shop operating at that time?

A. Not that I know of. I didn't investigate.

.

Q. (By Mr. Bair) Now, why did you leave the plant on Monday morning with these other men? A. Well, they

[fol. 45] said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way.

(Mr. Bernstein) Just a minute. I move the last part be stricken out "thought there might be some heat brought into the plant that way."

That is his thought.

(Mr. Wescott) He asked for a thought.

(Mr. Bernstein) Let's read the question.

(Trial Examiner) All right. Let's leave it in. Go ahead.

(Mr. Bernstein) Exception.

Q. (By Mr. Bair) Were you aware of the statement that Jarvis had made to Caron which was relayed on to the men? A. I was.

Q. You were aware of that statement? A. Yes. Mr. Caron had told me of the statement.

Q. Did that affect your decision to leave? A. Partly.

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Q. Did you think that you had permission to leave? A. No.

Q. Did you think that you—that the leader, Caron, could give you permission to leave that morning? A. No.

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Q. Did you testify before the Maryland Department of Employment Security on February 24, 1959? A. Yes.

Q. In connection with the Unemployment Compensation Claim? A. That is right.

Q. Now, at that hearing before the Department of Employment Security, did you or did you not testify that the leader of the machine shop told you that it was too cold to work and that you were going home? A. That is right.

[fol. 46] Q. Did you or did you not testify that you had never questioned the authority of the leader before? A. No, I never had. I still didn't think I had permission.

(Mr. Bair) That is not responsive.

Q. (By Mr. Bair) Did you testify that you had never questioned Caron's authority before? A. No, I never questioned his authority.

Q. You never questioned his authority? A. No.

Q. Now, did you or did you not testify that you assumed that the leader was speaking for the foreman? A. Yes. I thought he was speaking for the foreman.

Q. You did? A. Yes.

Q. So when Caron said that Jarvis said it was too cold, if you had any guts you should go home, you thought Caron was speaking for Jarvis; right? A. Right.

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Q. (By Mr. Bair) How were you notified of your discharge? A. I received a telegram that evening.

• • • • •

(Trial Examiner) Do you have any of these other hostile witnesses?

(Mr. Bair) No, sir, Your Honor.

(Trial Examiner) Then you are ready to go to your regular case?

(Mr. Bair) Yes, sir.

WILHELM TAFELMAIER

was called as a witness and, having been first duly sworn, was examined and testified as follows:

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[fol. 47]

DIRECT EXAMINATION

• • • • •

Q. By whom were you employed on January 5, 1959? A. Washington Aluminum Company.

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Q. What was your duty—what were your duties with Washington Aluminum? A. Machinist.

• • • • •

Q. About what time did you report to work on January 5? A. I was a little late on this particular morning. About 7:25.

• • • • •

Q. And then what happened? A. I go to my tool box. When I went in the door to the machine shop, was the other fellows was standing-together. I went to my tool

box and opened it up and turn around. And the other fellows was already going out.

Q. Did you have any conversations with these other fellows? A. No. I just say good morning. That is all. Just across, you know.

Q. Did they speak to you? A. No.

.

Q. Where were you when you saw Dave Jarvis? A. When I returned from my tool box. I go back from my tool box to the office of Dave Jarvis and say well, it is really cold this morning. And then the other fellows was already gone.

Then I go back in the wash room and put my overcoat on and go back on the machine again.

.

(Trial Examiner) You testified that you went back and got your overcoat and put it on?

(The Witness) Right.

[fol. 48] (Trial Examiner) Why did you do that?

.

(The Witness) Because it was really cold.

(Trial Examiner) And did you continue to work in your overcoat?

(The Witness) Yes.

(Trial Examiner) The rest of the day in the plant?

(The Witness) Well, I figured it get warmer after a while. So I take my overcoat for a beginning.

(Trial Examiner) When did you take your coat off?

(The Witness) Oh, this was about ten-thirty.

(Trial Examiner) Did you put it back on in the shop after 10:30?

(The Witness) No. I don't need it anymore.

.

Q. You just went back to work? A. Yes.

Q. And you say that the plant was getting warmer by ten or 10:30, and you took your overcoat off? A. Yes, I took my overcoat off about 10:30.

Q. Do you know whether the large furnace in the A

shop was not operating when you first entered the job that morning?

A. I don't know. But I think not. Because it was too cold in there.

CROSS-EXAMINATION

Q. (By Mr. Wescott) Did you ever complain to Mr. Jarvis about the heat in the plant? A. No.

[fol. 49] How many times during that winter in the shop did you work with your overcoat on?

(The Witness) Just on this particular morning.

Q. (By Mr. Wescott) On January 5, 1959, did Mr. Heinlein, as he was leaving the shop, ask you to go with them? A. No.

Q. (By Mr. Bair) Was this Monday morning a very cold morning? A. Yes.

Q. It was one of the coldest of the winter? A. Yes.

(Mr. Wescott) I will stipulate to that.

(Mr. Bair) All right.

Q. (By Mr. Bair) You wore your overcoat only on this one morning? A. On this morning and this morning only, yes.

VINCENT BATTAGLIA

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. Were you employed by Washington Aluminum Company on January 5, 1959? A. Yes, sir.

Q. In what position? A. Watchman.

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Q. Now, when did you go to work on Sunday, January 4? A. Four o'clock Sunday evening.

Q. And how long did you work on that particular occasion; until what time? A. Four o'clock Sunday evening until Monday morning.

[fol. 50] Q. At what time? A. 7:30.

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Q. Now what are your instructions as to turning on the furnaces of the company in the morning? A. In the morning, I go to work five o'clock in the morning regular time. If it is cold during the night, I got orders to turn the heat for couple of hours, and then turn it off again, if it is really cold night. Five o'clock in the morning I put the heat on.

Q. On this particular Monday morning, did you turn on any of the heaters ahead of time? A. Yes, I did. One o'clock Monday morning.

Q. What heaters did you turn on? A. I turned all the heat on for about an hour and a half.

Q. For about an hour and a half? A. Yes, then turned it off.

Q. Then turned it on again? A. Then turned them on again five o'clock Monday morning.

Q. Did you have any trouble with any of the heaters or any of the furnaces on this Monday morning? A. Yes, one.

Q. Which one? A. The big furnace in A shop.

Q. The large furnace in the "A" shop? A. Yes.

Q. Did you try to turn on the large furnace at one o'clock in the morning? A. That is right. I try. But it didn't work.

Q. It did not work? A. No, sir.

Q. Did you try again at 5:00 o'clock? A. I tried again, yes.

Q. Did it work then? A. No, sir.

Q. What did you do when you found that you could not

start the furnace? A. Well, I wait until the time people coming in to work.

[fol. 51] Q. Waited until what time, sir? A. Seven o'clock. I stay right to the time the people started coming in. As soon as Mr. Roy come in, the electrician, I reported to him that the big furnace is out of order.

. . . .

Q. Then what did you do after you reported the furnace to him? A. As soon as Mr. Roy come in, I told him the furnace is out of order. He come in and put his lunch right on top of little table over where they got a box. And he went to see the furnace. He tried, but it didn't work. Then he pulled something out. That is where the motor is.

Q. What time? A. It was about quarter after seven when he come in.

. . . .

(The Witness) Twenty-five minutes after seven I punched my card and went home.

(Trial Examiner) It still wasn't working?

(The Witness) No. I don't know when it started to work.

. . . .

DAVID N. JARVIS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

. . . .

Q. (By Mr. Bair) By whom are you employed at present? A. Hanover Tool and Die Company.

. . . .

Q. By whom were you employed prior to that? A. Washington Aluminum Company.

. . . .

Q. Now, what units serve to heat the machine shop area? A. Well, primarily the big furnace in "A" building, which is right around the corner from the machine

[fol. 52] shop. There are ducts on top of the furnace which are directional. You can aim these things in one direction or another. We attempted to keep one of them aimed—well, one aimed through one door into the machine shop, which was my office, and the other one down to the other end, which more or less made the air go down into the lower end of "B" shop.

.

Q. Did you also have gas space heaters? A. Yes, we did.

Q. To heat the machine shop? A. Yes.

Q. How many of those? A. Well in the immediate area there were two. There was one that was mentioned down at the lower end of the machine shop, down in the corner, which was directed over the lathe group. Then there was another on the aisle which was directed toward the lower end of the shop where the dip tanks were located.

Q. Did the nature of your business require the doors to the outside from the machine shop area be opened? A. Yes, it did, quite frequently.

Q. For what purposes? A. It was necessary to operate the doors to bring in raw materials and to take out finished products. And I think it is reasonable that the majority of the time the doors were opened was to bring in raw materials.

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Q. Now, you have heard some testimony on direct that a number of these men here made complaints to you about the cold. Which of these men made complaints and what was the nature of the complaints, if any? A. Well, I can recall complaints not in a formal sense. It was, I think—I think the complaints were in the line of general griping that you have in the lot. It is either too cold or too hot or something of that sort. Specifically Ronnie and I have talked about it.

Q. Bonnie who? A. Mr. Caron. We talked about the cold or the heat. I can remember Bob Heinlein mentioning the fact that it was too cold.

[fol. 53] Q. Can you pinpoint these—you called it general griping—can you pinpoint that down to a specific number or specific times? A. No, sir.

Q. Did they ever ask you to do something of a specific nature about the cold? A. Not in a formal sense of requesting to go to management or something of that nature. I always accepted these things as the sort of griping that is done in a shop.

Q. Did they ever ask you to go to somebody higher up in management? A. No, sir.

Q. Now, turning to Monday morning, January 5th, how would you describe the weather conditions on that day? A. It was extremely cold.

Q. Was the wind blowing? A. Yes, it was.

Q. Was it colder on this particular Monday inside the machine shop than on other Mondays? A. Yes, it was.

Q. Do you have an explanation for this? A. Yes. When I arrived there, the main furnace in "A" building was not functioning.

Q. And what did you proceed to do about that? A. I spoke to the watchman. And when Roy Rose came in, why, we immediately got him working on the furnace.

Q. What time was this? A. A quarter after or twenty after, something like that.

Q. Then what did you do? A. Well, at that time I went over to the machine shop and looked around at the work that was in progress. In other words, I followed up on what the previous night shift had done. And then Ronnie and I had this conversation in my office.

Q. By Ronnie, who do you mean? A. Mr. Caron.

Q. Would you repeat that conversation—for the record? A. Well, the construction of the thing was it was pretty [fol. 54] cold in there that morning. And I did make the statement that has been said.

(Trial Examiner) What was the statement that you made?

(The Witness) Well, it has been brought up as to whether I said we or they. Frankly I don't recall. I said something about either we or they had any guts, they would go home. I don't know whether it was personal or plural. But I have to qualify this in the sense that it was partly Mr. Caron and my relationship. I don't know how to suitably put that into words.

Q. (By Mr. Bair) Well, do the best you can? A. Well, we—I tried to be most frank with Mr. Caron on everything that we did. I tried to have here a man that if need be could replace me in the shop, or was fully aware of what was going on. We also worked together, as I said before; and, therefore, I was under the impression that things of this nature that we had said and had been said prior to this at various times, such as if we had a bad job, why, I think—I think one specific job, I remember, we had a landing gear we were working on. Something went wrong with it. And remarks were made to the sense that “grab your tool box and let's go, this job is all fouled up.” Something of that nature. This was more or less our relationship. I don't know how I can dress that up anymore, or make it any clearer.

Q. Now, turning to the extent of your authority, did you have authority to send these seven men home on this particular morning if they had requested permission? A. No, sir.

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Q. (By Mr. Bair) You said if seven men went home it would close down the machine shop? A. It practically did, yes, sir.

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[fol. 55] Q. Now, would you have the authority to let seven men leave the plant to get a cup of coffee if he were extremely cold in the morning? A. Well that is a moot point. We had a coffee machine right in the shop. And the men could get coffee from this at any time that they so desired.

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After making these statements to Mr. Caron on this particular morning, what did you do next? A. Well, we

had one item there that had to be shipped out immediately that day. And the night shift prior to that Friday night had finished the job up. So I took it over to the shipping department with the shipping papers so that we could get this thing on the road as soon as the drivers came in.

Q. What time did you get back to your office, Mr. Jarvis? A. It was a few minutes after the whistle had blown. I am not quite positive as to the exact minute now. But I am sure the whistle had blown. It was past 7:30.

Q. And what took place when you got there? A. As I got back to my office, Bill George and the men were on their way out the door and they hollered to me. Bill said, "We are going home. Do you want to come with us?"

My first thought on the thing was that they were kidding.

Q. That what? A. That they were kidding.

Tafelmair came walking by, and he was sort of hesitant, or he looked puzzled. And I said to him, I said, "Where are you going?" He said, "Well, I think they are going home. I guess I will go too."

I said, "Well, now, just hold on a minute." So then I talked to Tafelmair. And, of course by this time this group of people had gone out the door.

Q. What did you tell Tafelmair to do? A. I told Tafelmair that this wasn't the thing to do; that we would have to make some arrangements. Consequently, he stayed with me.

[fol. 56] Q. Did you put him back to work? A. Yes, I did. Now, he mentioned yesterday that he got his overcoat. I would like to say that when he and I were talking, he told me it was cold. I said, well, do you have another coat? He said, yes. I said, well, why don't you get it and put it on.

Q. Now, how far were these men from you when George called to you? A. In terms of feet, that is hard for me to say.

Q. Well, what was their location and what was yours at the time this took place? A. I was standing by the door

to my office, or on that corner of the office there. And these fellows were going out through "A" shop.

Now, just in terms of feet, it surprised me so badly frankly, I would hate to even hazard a guess.

Q. Well, how near were they to the time clock? A. Well, I will say half way. I am not—that is just an estimate.

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Q. (By Mr. Bair) When these men were leaving the plant, did any of them ask you what the company was doing about the cold? A. No.

Q. Did any of them ask what the company intended to do about the cold? A. No.

Q. Did they ask you whether something was wrong with the heating system of the company? A. No. The only thing that was said to me was an invitation from Bill George to come along with them.

Q. That was the only thing you remember passing between you and the men as they left? A. Yes.

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(The Witness) Just as to the exact sequence of how this occurred I am not sure. However, I will say that I talked to Art Wampler. I had a man by the name of Zakas who had off and on worked in the machine shop; I had him brought over so I could put him to work. We [fol. 57] had a man up in "D" shop across the road, a man named Mike Kissell who ran a Bridgeport Mill for us; I brought Mike over to run a milling machine.

In the course of events we talked to Art Wampler, and then Mr. Rushton. And—

(Trial Examiner) Who is this last man?

(The Witness) Mr. Rushton is the President of the Company.

(Trial Examiner) Thank you.

Q. (By Mr. Bair) And then what was the result of these talks? A. Well, Mr. Rushton's decision on the matter was that these people left unwarranted and that they should be discharged.

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Q. Did any of these men return to the company that morning? A. Yes, Mr. Affayroux came back in, I will say, around nine o'clock.

Q. What did he say? A. He told me he had been over to the drive-in diner over on Southwestern Boulevard; that he got gotten a cup of coffee; and that he hadn't intended to go home; that he went over to get warm and to come back.

Q. Did he know at this time that he had been fired? A. I informed him of Mr. Rushton's decision, yes.

(Trial Examiner) Sustained.

Now, you say that Mr. Rushton made the decision to discharge these 7 men; is that correct?

(The Witness) Yes.

(Trial Examiner) What did he say at the time?

(The Witness) I don't remember the exact wording. But he said to the effect that these people left the premises unauthorized, and I want them discharged.

[fol. 58] (Trial Examiner) What reason did he give for discharging them?

(The Witness) That they had left the premises unauthorized. And this curtailed our operation. And this they were discharged for.

Q. (By Mr. Bair) What steps did you take to discharge the men? A. Well, I told them that they were discharged.

Q. How? A. Well, I called the ones that had phones and sent telegrams to the others.

(Trial Examiner) Except this one man who told you that he had gone out for coffee and he came back in?

(The Witness) Yes, sir.

Q. (By Mr. Bair) Did you have any later talks with Mr. George? A. I talked to Mr. George on the phone, I believe, first.

It is difficult to recall just when. At any rate when I called George, or he called me—I am not positive just how that went—but he informed me then when I was talking to him that he knew that he was wrong. He was the only one of the group that did admit that.

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Q. Did you have any later talks with Mr. Adams? A. Yes. Mr. Adams came in with a Doctor's certificate.

Q. When was that? A. The following day, I believe.

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Q. What happened to your machine shop operation on this morning when these seven men left? A. Well, that curtailed the operation completely for the moment with the exception of one man.

Q. Is it fair to say it shut down your shop? A. I think so, yes.

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[fol. 59] Q. Was it comfortable enough to work that morning? A. No. Actually it was a bit uncomfortable until I would say ten o'clock or somewhere around that time.

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Q. (By Mr. Bair) What time did the furnace start operation that morning? Remember the furnace in "A" shop that you had said was not operating, what time was it put in operation? A. About quarter to 8. About 7:45 I think is a fair guess on that.

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(Trial Examiner) On the fifth of January that this happened, what time of day was it that these two men and the man that you kept—you only had three men in there that day—worked at the various machinery without coats or various other clothing bundling them up? What time of day was it that they did that?

(The Witness) That is hard to say, sir. I would have to say that was probably after lunch time.

(Trial Examiner) But until lunch time they had to stand there at their machines working in some sort of excess amount of clothing?

(The Witness) Well, the nature of our business, sir, was such that we have the shop coats—there are coats for this purpose, and this is a common practice in that plant to wear a coat of that sort.

(Trial Examiner) What kind of a coat?

(The Witness) A shop coat. They are denim. They make them a little nicer for you nowadays.

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Q. (By Mr. Bair) Did any of the men going home ask you for permission? A. No.

Q. When these men returned to the plant, did any of them ask you to be reemployed? A. Yes.

Q. Which men? A. Mr. Affayroux for one. I don't know as it was put as a direct statement or request. That [fol. 60] was the terminology. You know what I mean. It was inferred that he would like to go back to work.

Q. Which of these men asked you? A. Well that is difficult.

Of Mr. Affayroux, I am quite sure.

Mr. George mentioned this.

To the best of my knowledge that is about the extent of it.

Q. Now, was this the same day or the next day or when? A. Well, in Mr. Affayroux's case, it was the same day. And in Mr. George's case, it was—let me see—it was several days later when he called me the second time.

Q. Now, when Mr. Adams brought you a Doctor's certificate, did he present this as an excuse? A. Yes, he did.

Q. He wanted to go back to work too, didn't he? A. Yes.

Q. And when was that? A. I believe that was the next day, the sixth.

Q. Did Mr. Adams say anything about being sick before he left on Monday? A. No, sir.

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CROSS-EXAMINATION

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Q. So that you don't remember who was going out? A. I remember specifically talking to Mr. Caron. I recall

Mr. George hollering to me, do you want to come along. So the other people, I have no explanation of it other than the fact that I just was flabbergasted or what have you; and I had to check the cards to make certain.

.

Q. Now, you knew why they were leaving, didn't you?
A. Not at first. When I talked to Tafelmair, I was made aware of it.

[fol. 61] Q. Which was right at the time they were leaving? A. Well, they were gone by the time I got the drift of what was going on.

Q. But you knew why they left when you talked to Mr. Rushton for sure? You knew that? A. Yes.

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Q. (By Mr. Wescott) What was your reply to the man who said "come on, aren't you going with us?" A. I don't believe I made a reply to that.

Q. You didn't say anything? A. No. My first thought was that was a put-up joke or something of that nature.

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(The Witness) It just didn't occur to me these fellows were going home and leave me high and dry there. I don't know if that is hard to understand, but I just could not understand it at the moment.

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Q. All right. Now, when you made these phone calls to the men to inform them of their discharge, had you hired—had there been any new men hired to replace these men? A. No.

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Q. Now, if a man is to be discharged or disciplined, would you have the right to recommend his firing or his discipline, or to discharge him? A. Yes.

Q. And would you also have the right to hire a man? A. Yes.

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RAYMOND G. TARRANT

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

[fol. 62]

DIRECT EXAMINATION

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Q. What is your present position with the company?

A. Plant manager.

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Q. (By Mr. Bair) Now, Mr. Tarrant, did any of these 7 men who left the plant on January 5 make any formal complaints to you about the cold working conditions in the plant? A. No, sir.

Q. Did any of the men gripe to you about the cold in an informal way? A. Yes. We have had discussions relative to the weather, whether it was hot or cold or wet.

Q. Were any of these gripes of a specific nature? A. No, sir.

Q. Now, which of these men made these gripes to you? A. I would say that I have talked to all of them at one time or another, as I passed through the plant.

Q. Over how many years? A. As many as I have been employed there.

• • • •

(Trial Examiner) When you talked to George and he told you that he wanted to go back, what did you tell him?

• • • •

(The Witness) I told him that the decision had been made to discharge the employees. And in view of the fact that we couldn't tolerate having people just walk out of the plant at any time that I didn't think we could take him back.

• • • •

ARTHUR WAMPLER

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

[fol. 63]

DIRECT EXAMINATION

Q. What is your present position? A. General foreman.

Q. And how long have you had that position? A. November 1958.

Q. Now, did any of these seven men prior to January 5, 1959 ever lodge a formal complaint with you about cold working conditions in the machine shop? A. No, not at all.

Q. Did any of them gripe generally to you about the cold? A. In normal conversation.

Q. What kind of conversation? A. Well, being associated with the men from time to time while I, myself, was in the shop, I would talk to them on various problems, various topics of any current nature.

Q. Would they also complain about the heat in the summer time? A. Oh, yes.

Q. Who is Mr. Esender? A. He at one time was production manager. He is the equivalent to the general foreman, the titles being different.

Q. What was his position with the company during the winter of 1958-1959? A. He was the production coordinator.

Q. What were his duties? A. More or less to channel the work through into the shop from engineering, contracts, to myself, in the form of a work order.

Q. Was he in the chain of command, so to speak, between these men and you and the top of the company? A. Not at that time, no sir.

Q. Who is Mr. Campbell? A. Mr. Campbell was a previous general foreman or production manager.

Q. Was he with the company during the winter of 1958-1959? A. Yes.

[fol. 64] Q. What was his position with the company then? A. He was in the estimating department.

Q. And where are their offices located? A. In the engineering building across the street.

Q. How far away is that from the machine shop? A. That is in another building, approximately 200 to 300 feet away.

Q. (By Mr. Bair) What are the instructions to the watchman of the company as to turning on heating units on the mornings of the working days? A. Turning on in the mornings probably at five o'clock, exactly five o'clock, or thereabouts.

Q. Now, were the heating units ever turned on before five o'clock in the morning?

(The Witness) Yes. Part of the watchman's instructions were at any time on the week-ends or nights when the temperature becomes severe to turn on all the heaters at regular intervals to protect and maintain above-freezing condition in the buildings.

Q. (By Mr. Bair) What time did you arrive at the plant on the morning of January 5? A. Between 7:45 and 8:00 o'clock.

Q. What did you first do? A. I entered the shop office.

Q. What happened then? A. Almost immediately Mr. Jarvis entered and told me that the men in the machine shop had left their jobs, with one exception.

Q. Continue? A. The first step that I took was to find out why, and I was informed that it was too cold. I realized we had critical jobs in the machine shop. And I took steps to supply Mr. Jarvis with men to carry these jobs on.

[fol. 65] Q. And who were these men? A. A man by the name of Kissel, and a man by the name of Zakas.

Q. Was your machine shop operation curtailed by this walkout? A. Very much so.

Q. In what way? A. The fact that had to stop the jobs that they were normally working on. The men that we replaced them with moved into the machine shop, and their jobs were stopped.

Q. (By Mr. Bair) Did you take part in the decision to fire the 7 men? A. Yes.

Q. What time was that decision made approximately? A. Between 9 and 9:30, as near as I can recall.

Q. By whom? A. By myself, Mr. Jarvis and Mr. Rush-ton.

Q. And did you discuss the reasons behind your deci-sion? A. Yes.

Q. Why did you fire these men? A. For violating plant rules, leaving the plant without permission, and to main-tain discipline.

(Trial Examiner) Wait a minute.

Violating plant rules and leaving the plant without per-mission is the same thing, isn't it?

(The Witness) Well they left without the foreman's permission.

(Trial Examiner) All right. They left without permis-sion. And they violated the plant rule when they left without permission, didn't they? It is the same thing, isn't it?

(The Witness) Yes, I would say so.

(Trial Examiner) And to maintain discipline, you didn't fire them for that?

(The Witness) No, not for that reason.

[fol. 66] (Trial Examiner) Then you fired them because they left the plant?

(The Witness) Correct.

(Trial Examiner) Without permission?

(The Witness) Correct.

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Q. (By Mr. Bair) Were there any other reasons why you fired these men? A. No other reasons, no.

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ROY V. ROSE

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

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Q. And were you maintenance man in January of 1959?
A. Yes, sir.

Q. When did you arrive at the plant on the morning of January 5, 1959? A. Well, to be definite I can't say to a minute. But to my normal arrival time, it was somewhere between 7 o'clock to 7:15 in the morning every day. So I would say that day was like all others.

Q. Was anything wrong with the main furnace when you got to the plant that morning? A. Yes, sir.

Q. What was wrong with it? A. Well there was a switch on the back of the furnace that switches the furnace from manual operation to automatic operation. This switch had been placed in the manual position.

When this switch is in the manual position, the fan on the furnace will run. The electrodes will not operate, or the furnace will not burn.

[fol. 67] Q. (By Mr. Bair) It was blowing cold air at the time, wasn't it? A. Yes, sir.

Q. (By Mr. Bair) Did you fix it and how long did it take you? A. Yes, sir I did fix it. And I would say something like 15 or maybe 20 minutes.

Q. And what time of the day was it fixed and operating? A. I think that it was operating before the bell rang. But I wouldn't be positive. It might have been a minute or two later.

Q. After 7:30 in the morning? A. Yes, sir.

(Trial Examiner) After that heater gets to running, that furnace, how long does it take it to be running full capacity?

(The Witness) It will take it, I will say, five to eight minutes to have its full capacity of heating at the furnace.

(Trial Examiner) At the furnace?

(The Witness) Yes.

(Trial Examiner) And how long will it be before it is throwing any heat any appreciable distance away from the furnace, say, 50 feet from that furnace?

(The Witness) Well something from 10 to 15 minutes.

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(Trial Examiner) Do you mean to say that furnace would heat up in that plant within 15 or 20 minutes?

(The Witness) No, sir.

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(The Witness) And you can feel the heat coming out from the ducts at the top of the furnace for 40 to 50 feet within 10 to 15 minutes. As far as having it actually having warm 40 to 50 feet within 15 or 15 minutes, it will not do that.

[fol. 68] (Trial Examiner) How long did it take on that January 5th, before it got the building warm within 50 feet of the furnace?

(The Witness) I would say from 2½ to 3½ hours.

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FRED N. RUSHTON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

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Q. What is your position? A. President.

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Q. I show you General Counsel's Exhibit No. 3 and ask you to refer to the heating units that heat A shop and B shop. And I ask you whether since 1952 those units were in and furnishing heat at that time? A. In 1952 we have added adjacent to the B shop we have put in 185,000 Btu heater, and in the north end of A shop we have installed half a million Btu heater since that time.

Q. When did you install the half million Btu heater in "A" shop? A. The latter part of November in 1958.

Q. Now, have you ever received any formal complaints from the seven men that it was too cold to work in the machine shop? A. Well, I have been out of the shop for 2½ or 3 years. Prior to that I have had some gripes.

Q. What was the nature of them and how many? A. Well just as such "It is cold today." No more than we have talked about the heat the last week, it has been pretty unbearable.

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Q. (By Mr. Bair) Do you have any written company rules relating to leaves of absence and leaving the plant with or without permission during working hours? A. We have an unwritten rule. You certainly can not permit [fol. 69] a thing of this nature happening when it—whether it involved one man or a dozen men. You have got absolute chaotic condition.

Q. (By Mr. Bair) Now, did you visit the plant during the week-end of January 3 to January 5, 1959? A. Yes, I did. I visited there probably about ten o'clock the night of the 4th, which was a Sunday night. It was quite cold.

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Q. Now, when did you arrive at the plant on Monday, January 5? A. Well, this morning I arrived there approximately 20 past 8. I immediately proceeded to the plant, which I don't normally do. Because of the cold weather I wanted to see that everything was carried out the way we discussed the night before. I walked through all the shops. I noticed that the machine shop was empty. I didn't think anything about it. I thought maybe they had gone and got a cup of coffee, or maybe went to get warned up.

So I proceeded to walk through the balance of the shops and out to the paint shop and around the yard where there were some men working. And I came back in the shop. And when I came back in B shop again I noticed all the people were out of the shop.

So Dave Jarvis was there. And I said, "Dave, where is everybody?"

He said, "They have all walked off."

I said, "We can't have that, Dave."

"Well", he said "they have all gone."

I said, "Dave, if they have all gone, we are going to terminate them."

So, I said, "Well, before you do that now, I want a list of these people, whoever they are." And I said, "I will see you over in Mr. Tarrant's office."

So we got over in Mr. Tarrant's office, and I asked for Mr. Wampler to come in. He was involved. I asked him [fol. 70] what he knew about the situation. We discussed it at great length. I did personally, because when he gave me the names of the people, they were all good men. They have worked for us; they have helped us to build this company. And we discussed the pros and cons of the damages that it might do to us by stopping productivity. We discussed the disciplinary action that should be taken.

Like I say, a thing like that, it could bring a chaotic condition throughout the plant, if we permitted anything like that.

(Mr. Wescott) I move that be stricken.

(Trial Examiner) It may be stricken beginning with the description of what they talked—what you and your other officials talked about.

Q. (By Mr. Bair) What were your own reasons for making the decision to terminate these men?

(The Witness) Well, the real reason of course is that I was very upset at the foreman for not getting the information from those fellows, not getting the—

(Trial Examiner) Is that the reason you discharged the men, because the foreman didn't get the information?

(The Witness) The real reason is because they didn't inform the foreman of the action they were taking.

(Trial Examiner) Is that the reason you discharged them?

(The Witness) That, plus the disciplinary action.

(Trial Examiner) All right. Thank you.

Q. (By Mr. Bair) Did you find out from the foreman whether they had asked permission to leave the plant?

A. Yes. After we had the meeting in the office.

Q. What did the foreman say? A. He said he hadn't had an opportunity to talk to them; they had just walked off. And there is where I got pretty hot at him for not— [fol. 71] Q. If the men walked off without the foreman's

permission, would that be a violation of the company's rules? A. It certainly would.

Q. (By Mr. Bair) About what time was this decision made to terminate the men?

A. I beg your pardon. Nine o'clock.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 1-F

ORDER DIRECTING HEARING

On March 17, 1959, pursuant to a "Stipulation for Certificate Upon Consent Election" entered into by the parties hereto, an election by secret ballot was conducted in the above-entitled proceeding under the direction and supervision of the Regional Director for the Fifth Region (Baltimore, Maryland). Upon the conclusion of the election a Tally of Ballots was furnished the parties in accordance with the Rules and Regulations of the Board.

The Tally of Ballots shows that there were approximately 144 eligible voters and that 144 ballots were cast, of which 68 were for the Petitioner, 70 were against the Petitioner, 5 were challenged and 1 was void. At the count of the ballots, the Board Agent ruled that one ballot was void and that another was a "No" vote, while the Petitioner argued that the ballot which was ruled void should have been counted as a "Yes" vote, and that the ballot counted as a "No" vote should have been considered void. Accordingly, the Petitioner wired its objections to the rulings on March 30, 1959. The Regional Director considered the status of these 2 ballots and, inasmuch as the challenges were sufficient in number to affect the results of the election, investigated the challenges, and,

thereafter, on June 11, 1959, issued and served upon the parties his Report on Challenges.

In his report the Regional Director stated that he is of the opinion that the ballot ruled as void was intended to [fol. 72] be a "Yes" and he, therefore, recommended to the Board that the ballot be found to be valid and counted as a "Yes" vote. As to the ballot ruled as a "No" vote, the Regional Director stated that he is of the opinion that the intent of the voter was to cast a "No" vote and he, therefore, recommended that the ruling of the Board Agent on this ballot be sustained. With respect to the challenged ballots, the Regional Director recommended that the challenge to the ballot of Donald Dicus be overruled and that the ballot be opened and counted at an appropriate time. The remaining four challenged ballots belong to individuals named as discriminatees in a complaint issued by the Regional Director on May 15, 1959, in Case No. 5-CA-1498. The Regional Director found that the eligibility of these four voters depends upon the resolution of the unfair labor practice case and he, therefore, recommended to the Board that it order a consolidation of the instant case with Case No. 5-CA-1498 solely as to the eligibility to vote of Robert A. Heinlein, Frank Olshinsky, Augustine Affrayroux and Warren A. Hovis.

Inasmuch as no exceptions were filed to the Regional Director's report by any of the parties within the time provided therefor, the Board decided to adopt the Regional Director's recommendations as contained in his report. Accordingly,

IT IS HEREBY ORDERED that the ballot ruled as void by the Board Agent be, and it hereby is, found to be valid, and that it be counted as a "Yes" vote, and that the ruling of the Board Agent as to the ballot ruled as a "No" vote be, and it hereby is, sustained; and

IT IS FURTHER ORDERED that the challenge to the ballot of Donald Dicus be, and it hereby is, overruled and that it be opened and counted at an appropriate time; and

IT IS FURTHER ORDERED that a hearing be held before a Trial Examiner, to be designated by the Chief Trial Examiner, to resolve the issue raised on the eligibility to vote

of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux and Warren A. Hovis, and that such hearing may be [fol. 73] consolidated with the hearing in the complaint issued in Case No. 5-CA-1498, solely with respect to such eligibility; and

IT IS FURTHER ORDERED that the Trial Examiner designated for the purpose of conducting the hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the said issues. Within the time provided for in the Board's Rules and Regulations, any party may file with the Board in Washington, D. C., an original and six copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Trial Examiner; and

IT IS FURTHER ORDERED that the above-entitled proceeding be, and it hereby is, referred to the Regional Director for the Fifth Region for the purpose of arranging such hearing, and the said Regional Director be, and he hereby is, authorized to issue early notice thereof.

Dated, Washington, D. C., June 30, 1959.

By direction of the Board:

GEORGE A. LEET,
Acting Associate Executive Secretary

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER

Upon charges duly filed by Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO (herein called the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for the Fifth Region, issued a complaint dated May 5, 1960, against Washington Aluminum Company, Inc. (herein [fol. 74] called the Respondent), alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5) and Sections 2 (6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent and the Charging Party, herein called the Union.

With respect to the unfair labor practices, the complaint alleges, in substance, that the Union was and is the exclusive representative of all production and maintenance employees of the Respondent in an appropriate unit, and that on April 21, 1960, and at all times thereafter, Respondent unlawfully refused to bargain collectively with the Union.

Respondent's Answer, filed May 9, 1960, admits certain jurisdictional and factual allegations of the complaint, but denies the commission of unfair labor practices.

On June 9, 1960, all parties to the proceeding entered into a stipulation of facts, and on the same date jointly agreed to transfer this proceeding directly to the Board for finding of fact, conclusions of law and decision and order. The stipulation states that the parties have waived their rights to a hearing before a Trial Examiner, and to the issuance of an Intermediate Report. The stipulation provides in substance that the entire record in this case shall consist of the formal pleadings herein together with the entire record in Case No. 5-RC-2682, the Board's Decision, Direction and Order in the consolidated Cases Nos. 5-CA-1498 and 5-RC-2682,¹ and copies of 3 letters

¹ *Washington Aluminum Company, Inc.*, 126 NLRB No. 162.

representing correspondence between the Respondent and the Union following the latter's certification by the Board.

On June 14, 1960, the Board granted the parties' motion to transfer the case to the Board. Upon the basis of the parties' stipulation and the entire record in the case, the Board² makes the following:

[fol. 75]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Delaware corporation, is engaged in the fabrication of aluminum products at its Baltimore, Maryland, plant. During a one year period, being representative of its operations at all times material herein, Respondent shipped products valued in excess of \$50,000 to points outside the State of Maryland. Accordingly, we find that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, is a labor organization as defined in Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The facts as stipulated show that the Union was certified as bargaining agent for the production and maintenance employees of the Respondent on April 13, 1960,³ and that the Respondent, by letter dated April 21, 1960, refused and continues to refuse to bargain with the certified bargaining agent of its employees.

² Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

³ The complaint alleges, and Respondent admits, that the appropriate unit consists of all production and maintenance employees, including working leaders employed at the Company's Baltimore, Maryland, plant, excluding all office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act.

The Union filed its petition for certification of representatives^{*} on February 2, 1959, and an election was held on March 17, 1959, pursuant to a stipulation for certification upon consent election. On May 15, 1959, the Regional Director for the Fifth Region issued a complaint in Case No. 5-CA-1498, alleging, *inter alia*, that four individuals, who had cast ballots subject to challenge in the earlier election, were discriminatorily discharged on or about January 5, 1959, for engaging in protected concerted [fol. 76] activity. As the challenges were sufficient in number to affect the results of the election, and the eligibility of the individuals who cast the challenged ballots depended upon the resolution of the unfair labor practice case, the Board directed that the two cases be consolidated and heard before a Trial Examiner. The Trial Examiner, after a hearing, found that the four individuals had been unlawfully discharged and that they were therefore entitled to vote; the Board agreed.[†] The challenged ballots were opened, a Revised Tally of Ballots was issued on April 7, 1960, and the Union, having received a majority of the valid votes, was certified as exclusive bargaining representative on April 13, 1960.

The Respondent's position, as reflected in its Answer to the Complaint and in letters dated April 21, 1960, responding to the Union's request to bargain, is essentially that the findings of the Board in the earlier consolidated representation and complaint case are erroneous, that it is taking steps to review that case in the Court of Appeals for the Fourth Circuit, and that the "Company is not in a position to sit down with the Union and negotiate a contract covering wages and working conditions for the reason that, if the Fourth Circuit ultimately decides the case in favor of the Company, the Company would be under no duty to recognize the Union as the bargaining representative for the Company's employees."

Under these circumstances and upon the basis of the entire record, we find that the Respondent, by its admitted refusal to bargain with the Union, as the certified bar-

^{*} Case No. 5-RC-2682.

[†] *Washington Aluminum Company, Inc.*, 126 NLRB No. 162.

gaining representative of its employees, on and after April 21, 1960, has violated Sections 8 (a) (5) and (1) of the Act.*

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III, above, occurring in connection with its operations as [fol. 77] described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent refused to bargain collectively with the Union as the exclusive representative of employees in the appropriate unit, we shall order that the Respondent bargain collectively with the Union, upon request, as the statutory representative of the employees in the unit, and if an understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

1. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, is a labor organization as defined in Section 2 (5) of the Act.

2. All production and maintenance employees employed at the Company's Baltimore, Maryland, plant, including working leaders, but excluding all office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

* *The Cross Company*, 127 NLRB No. 88; *Old King Cole, Inc.*, 119 NLRB 837, *enfd* 260 F. 2d 530 (C. A. 6).

3. The above-named labor organization was on April 21, 1960, and has been at all times thereafter the exclusive representative of all the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. By refusing to bargain collectively with the above-named labor organization, as the exclusive representative of all the employees in the unit described above, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a)(5) of the Act.

5. By the aforesaid conduct, Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in, and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Washington Aluminum Company, Inc., Baltimore, Maryland, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, as the exclusive bargaining representative of employees in the appropriate unit.

The appropriate bargaining unit is:

All production and maintenance employees employed at the Company's Baltimore, Maryland, plant, including working leaders, but excluding all office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

[fol. 79] (a) Upon request, bargain collectively with Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, as the exclusive representative of the employees in the appropriate unit, as found above, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Baltimore, Maryland, plant, copies of the notice attached hereto and marked "Appendix." Copies of such notice, to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, in conspicuous places including all places where notices to employees are customarily posted, and maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Fifth Region, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C.

BOYD LEEDOM, *Chairman*
JOSEPH ALTON JENKINS, *Member*
JOHN H. FANNING, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

'In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order".

[fol. 80] APPENDIX TO DECISION AND ORDER

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with **INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO**, as the exclusive bargaining representative of the employees in the appropriate unit.

The appropriate bargaining unit is:

All production and maintenance employees employed at the Company's Baltimore, Maryland, plant, including working leaders, but excluding all office clerical employees, guards, watchmen, professional employees and supervisors as defined in the Act.

WE WILL, upon request, bargain collectively with the aforesaid labor organization as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WASHINGTON ALUMINUM COMPANY, INC.
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 81]

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD****GENERAL COUNSEL EXHIBIT 1-C****COMPLAINT AND NOTICE OF HEARING****VII.**

On March 17, 1959 a majority of the employees of Respondent in the unit described above in paragraph VI, in a secret ballot election conducted in the matter of *Washington Aluminum Company, Inc.*, Case No. 5-RC-2682, designated the Union as their representative for the purposes of collective bargaining with Respondent, and, by virtue of Section 9, subsection (a), of the Act, at all times since that date has been and is now the exclusive representative of all the employees of Respondent in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment. On April 13, 1960 the Regional Director for the Fifth Region issued his Certification of Representative, formally designating the Union as the representative of the employees in said unit for the purposes of collective bargaining.

VIII.

On or about April 15, 1960, while Respondent was engaged in operations described above in paragraphs II, III and IV, the Union requested Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other conditions of employment with the Union as exclusive representative of all employees of Respondent in the unit described above in paragraph VI.

IX.

On or about April 21, 1960 and at all times thereafter, down to and including the date of the issuance of this Complaint, Respondent did refuse and continues to refuse to bargain collectively in good faith with the Union as the exclusive representative of all employees of Respondent in the unit described above in paragraph VI.

JOHN A. PENELLO, Regional Director
National Labor Relations Board,
Region 5, 707 N. Calvert Street, 6th
Floor, Baltimore 2, Maryland.

[fol. 82]

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD****GENERAL COUNSEL EXHIBIT 1-D****ANSWER**

2. Respondent denies the allegations of Paragraph VII of the said Complaint, except that Respondent admits that the Regional Director for the Fifth Region issued a Certificate of Representative on April 13, 1960, designating the Union as the collective bargaining representative of the Respondent's production and maintenance employees.

3. Respondent admits the allegations of Paragraphs VIII and IX of the said Complaint.

5. Answering further the said Complaint, Respondent says that in the secret ballot election referred to in Paragraph VII of the said Complaint held on March 17, 1959, the final tally would have shown only sixty-nine votes cast for the Union as against seventy-one votes cast against the Union but for the fact that four votes also cast for the Union were votes of four employees of Respondent who had been discharged for cause on January 5, 1959, or almost a month prior to the eligibility date fixed by the Stipulation for Certification Upon Consent Election, that after Complaint and Hearing, the Labor Board ordered reinstatement of said four employees and the counting of the ballots of said four employees but that Respondent asserts that said Order of the Labor Board is in error and is totally unsupported by any substantial evidence contained in the record of the hearing of said case, being Case No. 5-CA-1498, that Respondent is taking steps to review said Order of the Labor Board in the United States Court of Appeals for the Fourth Circuit, and that in the event that the United States Court of Appeals for the Fourth Circuit denies enforcement of said Order of the Labor Board, the Respondent will be under no duty whatsoever to bargain collectively with the Union and will not have engaged in the unfair labor practices alleged in Paragraphs X and XII of the said Complaint.

[fol. 83] WHEREFORE, having fully answered the said Complaint, Respondent prays that the same be dismissed.

ROBERT R. BAIR,
1409 Mercantile Trust Building
Baltimore 2, Maryland
PLaza 2-6780
Solicitor for Respondent

CERTIFICATE OF SERVICE (omitted in printing)

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL EXHIBIT 1-E-12

Case No. 5-RC-2682
Date issued April 7, 1960
XX stipulated

REVISED TALLY OF BALLOTS
(Counting of Challenged Ballots)

The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the National Labor Relations Board on March 31, 1960 and the addition of these ballots to the original Tally of Ballots, executed on March 17, 1959, were as follows:

[Feb. 84]

	Original Tally	Challenged Counted	Final Tally
Approximate number of eligible voters	144 ¹		
Void ballots	0		
Votes cast for: Petitioner	69	4	73
Votes cast against participating labor organization(s)	70	1	71
Valid votes counted	139		144
Unopened challenged ballots	5		0

A majority of the valid votes as shown in the final tally column has been cast for Petitioner.

For the Regional Director—Fifth Region
LOUIS S. WALLERSTEIN.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the final tally, were fairly and accurately done, and that the results were as indicated above: We also acknowledge service of this Tally.

For Employer
ROBERT A. BAIR

For Petitioner
JACK GERSON

¹ As revised by the Board's Order Directing Hearing dated June 30, 1959.

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

GENERAL COUNSEL EXHIBIT, 1-F

April 15, 1960.

**Washington Aluminum Company, Inc.
Knecht Ave. & Pennsylvania Railroad
Baltimore 27, Maryland
Attn: Mr. Fred Rushton**

Dear Sirs:

As the Certified Bargaining Representative for your employees, we are hereby notifying you that we desire to [fol. 85] meet with representatives of the Washington Aluminum Company, Inc. for the purpose of negotiating a Labor Agreement covering wages and working conditions.

Please notify us when a meeting for the above stated purpose would be convenient for you, keeping in mind that we wish to begin negotiations as quickly as possible.

Yours very truly,

**JACK GERSON,
Regional Director.**

**JG/fr
Certified Mail
Return Receipt Requested**

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

GENERAL COUNSEL EXHIBIT 1-G

**WASHINGTON ALUMINUM COMPANY, INC.
Knecht Avenue & Pennsylvania R. R.
Baltimore 29, Maryland
Circle 2-1000**

April 21, 1960.

**Mr. Jack Gerson, Regional Director
Industrial Union of Marine and Shipbuilding
Workers of America, AFL-CIO
111 Cherry Hill Road
Baltimore 25, Maryland**

Dear Mr. Gerson:

This will acknowledge receipt of your letter dated April 15, 1960.

I believe that you have already received a copy of a letter from our counsel, Robert R. Bair, to the National Labor Relations Board dated April 8, 1960, in which Washington Aluminum Company advised the Board that it was unable to comply with the Board's order because it was under the firm conviction that the findings of the Trial Examiner and of the Board were erroneous. In other words, the Company is taking steps to review the entire [fol. 86] matter in the United States Court of Appeals for the Fourth Circuit.

Pending the outcome of the "appeal" to the Fourth Circuit, the Company is not in a position to sit down with the Union and negotiate a Contract covering wages and working conditions for the reason that, if the Fourth Circuit ultimately decides the case in favor of the Company, the Company would be under no duty to recognize the Union as the bargaining representative for the Company's employees. In the event that the Fourth Circuit does decide the matter in favor of the Union, we shall be glad to sit

down with the Union immediately and bargain in good faith a Contract covering wages and working conditions.

Very truly yours,

Washington Aluminum Co., Inc.
FREDERICK N. RUSHTON
President.

FNR/ah
Registered Mail,
Return Receipt Requested

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

GENERAL COUNSEL EXHIBIT 1-H

**WASHINGTON ALUMINUM COMPANY, INC.
Knecht Avenue & Pennsylvania R. R.
Baltimore 29, Maryland
Circle 2-1000**

April 21, 1960.

**Mr. Jack Gerson, Regional Director
Industrial Union of Marine and Shipbuilding
Workers of America, AFL-CIO
111 Cherry Hill Road
Baltimore 25, Maryland**

Dear Mr. Gerson:

By registered letter of even date, herewith, we advised you that the Company is taking steps to review the labor [fol. 87] matter in the United States Court of Appeals for the Fourth Circuit and that, pending the outcome of the "appeal", the Company is not in a position to sit down with the Union and negotiate a Contract covering wages and working conditions. The letter also pointed out that in the event the Fourth Circuit decides the matter in favor of the Union, the Company will sit down with the Union

immediately and bargain in good faith a Contract covering wages and working conditions.

It may be as many as six months before the matter is ultimately disposed of by the Fourth Circuit Court of Appeals. A small number of our employees are now eligible, or in this six months' interim period will become eligible, to receive periodic wage increases which the Company proposes to grant in accordance with its past pattern and practices. The Company does not feel that the unresolved doubts concerning the election of the Industrial Union as a bargaining representative should prejudice the rights of a small number of the employees to wage increases which are deserved and which would have been granted in accordance with the practices of the Company in the absence of any litigation with the Labor Board.

Very truly yours,

Washington Aluminum-Co., Inc.
FREDERICK N. RUSHTON,
President.

FNR/ah

BEFORE THE NATIONAL LABOR RELATIONS BOARD

STIPULATION

VII.

On April 7, 1960, pursuant to the Board's decision, direction and order dated March 31, 1960, in Cases Nos. 5-RC-2682 and 5-CA-1498 (copy of which is attached hereto marked Exhibit E-11), five challenged ballots were opened in the presence of all the parties hereto, as a result of [fol. 88] which a Revised Tally of Ballots (attached hereto marked Exhibit E-12) was issued on April 7, 1960. On April 7, 1960, immediately prior to the opening of said challenged ballots, the Respondent expressly noted an ob-

jection to the opening of four of said challenged ballots on the ground that Respondent was taking steps to review Case No. 5-CA-1498 in the United States Court of Appeals for the Fourth Circuit and that, in the event the United States Court of Appeals for the Fourth Circuit denied enforcement of the said decision, direction and order of the Board dated March 31, 1960, the ballots of Robert A. Heinlein, Frank Olshinsky, Augustine Affayroux, Sr. and Warren A. Hovis would be null and void and of no effect. After noting said objection, the board agent, on behalf of the National Labor Relations Board, opened said challenged ballots.

VIII.

On April 18, 1960, Counsel for the General Counsel of the National Labor Relations Board, Fifth Region, forwarded the entire record in the matter of Washington Aluminum Company, Inc. and Robert A. Heinlein, Frank J. Adams, Frank Olshinsky, Warren A. Hovis, Augustine Affayroux, Sr., William George, Jr. and J. Alfred R. Caron, Case No. 5-CA-1498, to the Circuit Court Enforcement Section of the National Labor Relations Board, Washington, D. C., in order to institute the filing in the United States Court of Appeals for the Fourth Circuit of a Petition for Enforcement of the said decision, direction and order of the Board dated March 31, 1960 in Case No. 5-CA-1498.

IX.

On April 13, 1960 the Regional Director for the Fifth Region issued his Certification of Representative, formally designating the Union as the representative of the employees in the unit described in paragraph VI of the Complaint.

[fol. 89]

X.

The Union made a request upon Respondent for bargaining by letter dated April 15, 1960 which was received by Respondent on April 18, 1960; a copy of said letter is attached hereto marked Exhibit F and is incorporated herein as if fully set forth and rewritten herein.

XI.

Respondent replied to the Union's request referred to in paragraph VIII above by two letters dated April 21, 1960 which were received by the Union in the ordinary course of the mail; copies of said letters are attached hereto marked as Exhibits G and H and are incorporated hereon as if fully set forth and rewritten herein.



[fol. 90]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL EXHIBIT No. 2

That portion of General Counsel Exhibit No. 2 showing
(a) temperature and (b) wind velocity on the morning of
January 5, 1959.

U. S. Department of Commerce, Weather Bureau

LOCAL CLIMATOLOGICAL DATA

Baltimore, 'aryland' (Friendship International Airport)

January 1959

Latitude 39° 11' N. Longitude 76° 40' W. Elevation (ground) 164 ft. Eastern Standard time used

Date	Temperature (°F)					Precipitation		Snow Sleet or Ice on ground at 7:00 A.M. (In)	Wind				Sunshine		Sky cover	
	Maximum	Minimum	Average	Departure from normal	Degree days (base 65°)	Total (Water equivalent) (In)	Snow, Sleet (In)		Prevailing direction	Average speed (m. p. h.)	Speed (m. p. h.)	Direction	Total (hours and minutes)	Percent of possible	Sunrise to Sunset (tenths)	Midnight to midnight (tenths)
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
5	22	11	17	-18	48	0	0	0	WNW	24.4	43	NW	9:31	100	0	1

[fol. 1]

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

Fifth Region

Case No. 5-CA-1498

In the Matter of:

WASHINGTON ALUMINUM COMPANY, INC.

-and-

ROBERT A. HEINLEIN

FRANK J. ADAMS

FRANK OLSHINSKY

WARREN A. HOBIV

AUGUSTINE AFFAYTROUGH

WILLIAM GEORGE, JR.

J. ALFRED R. CARON

-and-

Case No. 5-RC-2682

WASHINGTON ALUMINUM COMPANY, INC.

EMPLOYER

-and-

**INTERNATIONAL UNION OF MARINE & SHIPBUILDING
WORKERS OF AMERICA, AFL-CIO.**

PETITIONER

TRANSCRIPT OF TESTIMONY—August 3, 1959

• • • • •

BEFORE:

LOUIS PLOST, Trial Examiner

[fols. 2-13] • • • • •

[fol. 14] **J. ALFRED R. CARON**

called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

[fols. 15-21]

[fol. 22] TRIAL EXAMINER: You say you made such a complaint about two weeks before the 5th of January?

THE WITNESS: We had a cold spell then, sir.

TRIAL EXAMINER: Thank you. And you made a complaint then?

THE WITNESS: To Dave Jarvis, the foreman, yes.

[fol. 23]

[fol. 24] Q. (By Mr. Wescott) Well, Mr. Caron, what was the condition of the plant on Monday mornings when you came in to work as compared to the regular time during the week?

TRIAL EXAMINER: Which Monday morning are you referring to?

MR. WESCOTT: Any Monday morning.

TRIAL EXAMINER: Any Monday morning?

THE WITNESS: It was always cold.

TRIAL EXAMINER: You don't mean in August, do you?

MR. WESCOTT: No. During the winter time.

THE WITNESS: It was cold and the men would be huddled around the furnace trying to get heat; trying to get warm?

Q. (By Mr. Wescott) Was it more cold on Monday morning than it would be during the week, during the winter times? A. Yes, sir, it seemed to be colder on Monday mornings.

TRIAL EXAMINER: It seemed to be or was?

THE WITNESS: Yes, sir, it was colder.

[fols. 25-28]

[fol. 29] Q. Now, did Mr. Jarvis actually give you permission to leave the shop? A. No, sir.

[fols. 30-33]

[fol. 34]

CROSS-EXAMINATION

Q. (By Mr. Bair) . . .

[fols. 35-40] . . .

[fol. 41] Q. Now, in this discussion that you had with Mr. Jarvis in his office, I think you testified that he said [fol. 42] if those fellows had any guts they would go home. Did you say that, Mr. Jarvis was serious in making that statement?

MR. WESCOTT: Objection. I think it calls for subjective thought.

TRIAL EXAMINER: Sustained.

Q. (By Mr. Bair) Did you take this as permission to go home? A. Oh, no, sir. No, sir.

Q. You did not? A. No, sir.

Q. But you at the same time relayed this statement on to the men as you have already testified? A. I told them what Dave had said, and that I was going home. And I said, "What are you fellows going to do?" They told me they were going to go home also because it was too cold to work.

[fols. 43-44] . . .

[fol. 45] Q. And you said on direct that you punched the time clock? A. No. On my way to the time clock, I ran into Dave. I saw him. I said, "I will see you tomorrow, I am going home."

He said, "Okay, Babe, I will see you tomorrow."

Then I punched out and I went home.

Q. So that means you were coming back the next day.

A. Yes, sir. I said, "I will see you tomorrow."

[fols. 46-52] . . .

[fol. 53]

ROBERT A. HEINLEIN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Orem) . . .

[fols. 54-55] . . .

[fol. 56] Q. What did you do then? A. Then I think I laid my lunch on the end of the table. I said to little Willy, I think the little German boy there, that we were [fol. 57] all going home, was he going home too. He said no, he couldn't because he wasn't a citizen and he couldn't get a job any place else.

[fols. 58-59] . . .

[fol. 60] CROSS-EXAMINATION

Q. (By Mr. Bair) . . .

Q. What did he say? A. I said, "How about enough heat in this place because it is cold." We didn't stand in one spot and work. We had to move around.

[fol. 61] Q. As you left the plant, you say you talked to Mr. Jarvis? A. He was coming out of his office toward me as I walked over to pick up my lunch.

[fol. 62] Q. Would you repeat the conversation you had with Mr. Jarvis at that time? A. As he came toward me I said, "Dave, it is awful cold; we are going home." I said, "Aren't you going with us."

He said, "Bob, you know I can't do that."

So I just picked my lunch up and walked out.

Q. Did you tell him why you were going home? A. I said it was too cold to work.

[fols. 63-64] . . .

[fol. 65]

WILLIAM GEORGE, JR.

was called as a witness, and having been first duly sworn,
was examined and testified as follows:

[fols. 66-68]

[fol. 69]

CROSS-EXAMINATION

Q. (By Mr. Bair)

. . . .

[fol. 70] Q. Did you notice people working around the
main furnace? A. No, sir.

Q. You did not notice anybody working in that vicinity?
A. No one at all.

[fol. 71] Q. Do you know whether or not the gas space
heaters in the machine shop were operating? A. No, sir.

Q. You don't know whether or not they were? A. No,
sir.

Q. Did you take the trouble to find out? A. No, sir.

. . . .

[fols. 72-74]

[fol. 75] Whereupon,

FRANK J. ADAMS

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair)

. . . .

[fol. 76] Q. You think it was much colder on this Mon-
day than on other Mondays? A. Yes.

Q. Did you notice whether or not the furnace was
[fol. 77] operating on this particular Monday morning?
A. No, I couldn't say whether it was running or whether
it was off.

. . . .

[fol. 78] Q. Did you intend to return the next day?
A. Yes.

MR. WESCOTT: Objection.

TRIAL EXAMINER: Sustained.

[fol. 79] . . .

[fol. 80] FRANK A. OLSHINSKY

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair) . . .

[fol. 81] Q. Did you see any men working about the
furnace on that morning?

[fol. 82] A. No, I didn't.

[fols. 83-93] . . .

[fol. 94] WARREN A. HOVIS

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Br. Bair) . . .

[fols. 95-97] . . .

[fol. 98] Q. And that that was authority for you to go
home; is that right? A. No that wasn't permission to go
home, no.

Q. You didn't think that was permission to go home?
A. No.

Q. But you thought it was authority to go home? A.
No. I thought it was just that if we had any guts we
would go home.

[fol. 99] . . .

[fol. 100] **WILHELM TAFELMAIER**

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

• • • •

DIRECT EXAMINATION

Q. (By Mr. Bair) • • •

• • • •

[fol. 101] • • • •

[fol. 102] Q. Where was Mr. Jarvis when you spoke to him? Where was he standing? A. About ten feet from his office.

Q. From his office? In the machine shop? A. In the machine shop, yes, between my lathe and his office.

• • • •

[fol. 103] Q. (By Mr. Bair) As you were talking with Mr. Jarvis about ten feet from his office, did you see the men walking out of the plant? A. Oh, at this time the men was already walked out. They was already gone.

• • • •

[fol. 104] **CROSS-EXAMINATION**

Q. (By Mr. Wescott) • • •

• • • •

[fols. 105-116] • • • •

[fol. 117] Q. Are you sure of that? A. Yes, I am sure of that.

Q. Could he have and you might not have heard him? Would that be possible?

A. No.

• • • •

[fols. 118-130] • • • •

[fol. 131] **DAVID N. JARVIS**

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair) . . .

[fol. 132] . . .

[fol. 133] Q. How large are these doorways that lead from "A" shop into the machine shop, in terms of width and height? A. I have to guess. I will say 10 feet wide and 8 or 9 feet high.

Q. And there are two doorways that lead into the machine shop area from "A" shop? A. There are three really. But concerning the heat from the big furnace, there were two in that vicinity.

Q. Were there any other openings from which you could pass from the machine shop to a shop? A. Yes, we knocked out the top two rows of windows separating "B" shop from "A" shop so that the heat from the entire building, from "A" building, would come through, and also from "C" shop on the other side.

[fols. 134-138] . . .

[fol. 139] Q. What is your authority as to granting leave of absence of men? A. Well, here again we had a relatively small company in a sense. And a lot of the rules and so forth were unwritten agreements more or less. It was something you understood.

In this sense if a man specifically, or one man would come and ask for time off, perhaps, say, a portion of a day—let's start it that way—I could say well, make a decision on this. If seven people wanted to go home and closed the machine shop down I didn't have that authority. If a man wanted two or three days off I would go to see Art Wampler or Ray Caron.

Q. Who are these people? A. Art Wampler is the general foreman. Ray Tarrante was the plant manager.

TRIAL EXAMINER: There was no written rule on it, was there?

[fol. 140] THE WITNESS: No, sir.

Q. Would you have authority to permit a man to go home if he were ill? A. Yes.

Q. Did such a thing ever happen? A. Yes. On occasion personnel from the shop would become ill, and I not only would grant permission for them to go home, but in instances I would provide transportation. I have sent men home by company's drivers.

In one instance, I took a man home myself.

[fols. 141-143]

[fol. 144] Q. Now, there has been some testimony here that Mr. Adams spoke to you as he was leaving. Do you remember that conversation? A. No, sir, not at all.

Q. There has also been some testimony here that Mr. Caron spoke to you half way between your office and the time clock. Do you remember that conversation? A. No, not at all.

Q. Did such a conversation take place? A. No.

[fols. 145-156]

[fol. 157] TRIAL EXAMINER: That is merely worn to protect their shirt isn't it, to keep oil and grease off of it? It isn't worn for warmth, is it?

THE WITNESS: Yes, sir. They flannel-line them nowadays.

TRIAL EXAMINER: Beg pardon?

THE WITNESS: I say they have flannel lining in them.

TRIAL EXAMINER: Did they at that time?

THE WITNESS: Yes, sir. I have one at home at the moment.

TRIAL EXAMINER: I see. And they wore that ordinarily at their work?

THE WITNESS: Yes, sir.

[fol. 158] TRIAL EXAMINER: But in any event, you say it was at least noon before—it was after lunch before it was warm up in that plant that they could take off excess clothing to work?

THE WITNESS: Yes, sir.

[fol. 159]

[fol. 160] CROSS-EXAMINATION

Q. (By Mr. Wescott) . . .

. . . .

[fol. 161]

[fol. 162] Q. And you were standing at the corner of your office, was that correct, when you saw the men going out? A. Yes.

Q. How far were you from the men? A. As I said before, I am not sure of the number of feet.

Q. Would you say it was more than 15 feet or 20 feet? A. Yes, I think so, yes.

. . . .

[fol. 163]

[fol. 164] TRIAL EXAMINER: He meant he knew why they left when he talked to Mr. Rushton, because they were gone?

MR. WESCOTT: Yes, sir.

. . . .

[fols. 165-166]

[fol. 167] TRIAL EXAMINER: It isn't worn for warmth, except that it might be lined with flannel in the winter time?

THE WITNESS: Well, I have one. And I wear mine for warmth.

. . . .

[fols. 168-175]

[fol. 176] RAYMOND G. TARRANT

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair) . . .

. . . .

[fol. 177] Q. Mr. Tarrant, I hand you a paper marked General Counsel's Exhibit No. 3, and I ask you if you can identify that? A. Yes. This is a lay-out of our plant which shows the heating arrangement of the main area of the plant.

.

Q. And I notice that there are certain markings in blue and certain markings in red.

Can you testify as to the accuracy of all those statements in blue and in red?

A. To the best of my knowledge these are as they are in the plant. The furnace in "A" shop is shown as a Drayvo Space Heater with 1,500,000 Btu.

Q. Is that accurate? A. That is, yes, sir.

Q. And there is another furnace in "A" shop at the lower part of the exhibit marked Drayvo Space Heater, [fol. 178] 500,000 Btu, is that accurate? A. Yes, sir, it is.

Q. Do both of those furnaces contribute to heating the "A" shop? A. Yes, they do.

Q. The areaway between the lower portion of "A" shop and the upper portion is open, is it not? A. Yes, it is one building.

.

[fols. 180-182]

[fol. 183] Q. (By Mr. Bair) Whom did you talk to? A. I spoke to Affayroux when he returned to the plant that day.

Q. What did Mr. Affayroux say to you? A. He told me that he had gone to the diner for a cup of coffee. He said he had been cold and he wasn't feeling well. And he came back. He had been informed that he had been discharged. And he wanted to go back to work.

Q. Did you talk to Mr. George after that morning? A. Yes. I had a telephone call from Mr. George.

Q. What discussion took place? A. Mr. George called me and he said that you know what has happened. I told him, yes, certainly I was aware of it. He said that he had had a discussion. He said he and his wife had [fol. 184] talked about this quite extensively. And he realized that they had made quite a serious mistake in walking off the job that morning. And he said he had

always enjoyed working at Washington Aluminum. And he realized that certainly some disciplinary action should be forthcoming.

He said, however, if we saw fit that he would like to have the opportunity to come back in.

[fols. 185-196]

[fol. 197]

GEOFFREY T. JONES

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair)

[fol. 198] Q. Would you give a definition of a Btu? A. Well a basic definition of a Btu is defined as the amount of heat required to raise one pound of water one degree fahrenheit.

However, there are other definitions or equivalents, as 778 foot pounds of energy, or it is approximately .0003 kilowatt hours.

Q. But the basic definition is what? A. The basic definition is the amount of heat required to raise the given substance a given number of degrees.

Q. In this case it was a pound of water one degree [fol. 199] fahrenheit? A. That is the basic definition, yes.

Q. I show you General Counsel's Exhibit No. 3 and point out in the center of the exhibit a space marked Dravo Space Heater, 1,500,000 Btu. And down below another space marked Dravo Space Heater, 500,000 Btu. Are you familiar with those two heating units in the "A" shop of Washington Aluminum Company? A. I see them almost every day.

Q. Now, I ask you whether the 1,500,000 Btu and the half million Btu referred to output or input? A. They refer to the output of the machine.

[fols. 200-202]

[fol. 203]

ROY V. ROSE

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

[fols. 204-206]

[fol. 207]

CROSS-EXAMINATION

Q. (By Mr. Wescott)

Q. (By Mr. Wescott) Will the furnace put out a full
capacity? Does it generally put out a full capacity?

A. Yes.

[fol. 208]

FRED N. RUSHTON

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Bair)

[fol. 209-216]

[fol. 217] Q. Did Mr. Adams talk to you later? A. Yes.

Q. When and where? A. Well it is pretty hard to say
where. I would say within a few days or a week maybe.
I don't know.

But he did call me on the phone, and Frank, I would
say, is one of our old employees, and we both felt very
bad about it. And Frank mentioned that he was sorry.
And I certainly was sorry. These are good men.

And he said that he thought he was in the wrong, and
maybe he could come back. I said, Frank, we will have
to wait a little bit and see how this thing works out.

[fols. 218-238]

[fol. 239]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL
LABOR RELATIONS BOARD—Filed September 10, 1960

To the Honorable, the Judges of the United States Court
of Appeals for the Fourth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its separate Orders issued on March 31, 1960, and August 16, 1960, against Respondent, Washington Aluminum Company, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, in Cases Nos. 5-CA-1498 and 5-CA-1696 respectively on the docket of the Board.

In support of this petition the Board respectfully shows:

1. Respondent is engaged in business in the State of Maryland, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

2. The complaint in Case No. 5-CA-1498 alleges that respondent had unlawfully discharged seven of its employees in violation of Section 8(a)(1) of the Act. Upon due proceedings had before the Board in said matter, the Board on March 31, 1960, duly stated its findings of fact and conclusions of law, and issued an Order directed to

the respondent, its officers, agents, successors and assigns, which required, *inter alia*, that respondent offer full and immediate reinstatement to said discriminatees.

[fol. 240] 3. The complaint in Case No. 5-CA-1696 alleges that respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the certified representative of its employees. In the representation proceeding before the Board which led to the certification of the representative of respondent's employees, and upon which the Board's order in Case No. 5-CA-1696 is based in part, respondent challenged the ballots of certain employees whom the Board found in Case No. 5-CA-1498 to have been unlawfully discharged. Inasmuch as the determination of the validity of the challenged ballots turned upon the same determination to be made in Case No. 5-CA-1498, i.e., whether the employees who cast such ballots were unlawfully discharged, the hearing thereon in the representation case was consolidated with the hearing in Case No. 5-CA-1498. Accordingly, upon issuance of its order in Case No. 5-CA-1498, the Board also directed that the challenged ballots be opened and counted, and that the Regional Director of the Fifth Region of the Board prepare and serve upon the parties concerned a Supplemental Tally of Ballots in said representation election. The Board's Direction and Order containing such determination and directives was served upon respondent by sending a copy thereof postpaid bearing Government frank, by registered mail, to respondent's counsel of record. Thereafter the challenged ballots were opened and counted, in accordance with the Board's Direction and Order, and on April 13, 1960, there issued the Board's certification of the representative of respondent's employees. Subsequent thereto respondent refused upon request, to recognize or bargain with the representative so certified, and the charge and complaint in Case No. 5-CA-1696 followed.

4. Upon due proceeding had before the Board in Case No. 5-CA-1696 the Board on August 16, 1960 duly stated its findings of fact and conclusions of law, and issued an Order directed to respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision

and Order was served upon respondent by sending a copy [fol. 241] thereof postpaid bearing Government frank, by registered mail, to respondent's counsel of record.

5. For the reasons stated in paragraphs 2, 3 and 4, above, Cases Nos. 5-CA-1498 and 5-CA-1696 present substantially a common record and involve a common legal issue, viz, whether the employees involved in Case No. 5-CA-1498 were unlawfully discharged. It is accordingly appropriate that these cases be presented to the Court as a single proceeding, and that a single petition be filed for the enforcement of the Orders in both cases.

6. Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 27(7) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits, stipulations and other material comprising the entire record of both proceedings before the Board upon which said Orders were entered, which transcript includes the pleadings, testimony and evidence, stipulations, findings of fact, conclusions of law, and the Orders of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcripts to be served upon respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, evidence, and stipulations, and the proceedings set forth in the transcript and upon the Orders made thereupon a decree enforcing in whole said Orders of the Board, and requiring respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 9th day of September, 1960.

[fol. 242] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 243]

DOCKET ENTRIES

September 10, 1960, notification of the filing of petition for enforcement, together with a copy of the petition, transmitted by mail to the respondent, Washington Aluminum Company, Inc., at Knecht Avenue and Pennsylvania Railroad, Baltimore 27, Maryland.

September 13, 1960, appearance of Dominick L. Manoli, Associate General Counsel, and Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, entered for the petitioner.

September 16, 1960, appearance of Robert R. Bair entered for the respondent.

[fol. 244]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

ANSWER TO PETITION FOR ENFORCEMENT—filed September
17, 1960

Washington Aluminum Company, Inc., Respondent, by Robert R. Bair and Venable, Baetjer and Howard, its attorneys, for its Answer to the Petition for Enforcement of Orders of the National Labor Relations Board filed herein, respectfully says:

1. Answering Paragraph 1 of said Petition, Respondent admits the allegations thereof.

2. Answering Paragraph 2 of said Petition, Respondent admits the allegations thereof.

3. Answering Paragraph 3 of said Petition, Respondent admits the allegations thereof.

4. Answering Paragraph 4 of said Petition, Respondent admits the allegations thereof.

5. Answering Paragraph 5 of said Petition, Respondent admits the allegations thereof.

6. Answering Paragraph 6 of said Petition, Respondent admits the allegations thereof.

7. Further answering said Petition, Respondent says that the Orders of the Board issued on March 31, 1960 [fol. 245] and August 16, 1960 are based upon findings of fact and conclusions of law of the Trial Examiner and the Board in Case No. 5-CA-1498 which are erroneous and totally unsupported by any substantial evidence contained in the record of Case No. 5-CA-1498.

WHEREFORE, having fully answered the said Petition, the Respondent prays that the same be dismissed.

/s/ Robert R. Bair

/s/ Venable, Baetjer and Howard
1409 Mercantile Trust Building
Baltimore 2, Maryland
Plaza 2-6780

Attorneys for Washington Aluminum
Company, Inc., Respondent

September 16, 1960

[fol. 246] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 247]

DOCKET ENTRIES

September 17, 1960, notification of the filing of answer to petition for enforcement, together with copy of answer, transmitted by mail to the National Labor Relations Board, Health, Education and Welfare Building, Washington 25, D. C.

September 20, 1960, statement of petitioner under section 3 of rule 10, filed.

September 20, 1960, statement of respondent filed.

[fol. 248]

[File endorsement omitted]

**IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 8211

[Title omitted]

**STIPULATION AS TO JOINT APPENDIX—filed September 20,
1960**

It is hereby stipulated by and between the parties hereto that, subject to the approval of the Court, a Joint Appendix to their briefs be prepared by both parties in lieu of a separate Appendix to each brief.

It is further stipulated that in the preparation of said Joint Appendix, each party shall designate so much of the record as it wants included, that Petitioner shall arrange for the printing of said Joint Appendix and shall file it in Court with its brief, and that the costs of printing said Joint Appendix shall be borne by each party in proportion to the amount of the Record it has designated.

/s/ **Marcel Mallet-Prevost**
Assistant General Counsel
National Labor Relations Board

/s/ **Robert R. Bair, Counsel for**
Washington Aluminum Co., Inc.,

[fol. 249]

DOCKET ENTRIES

October 14, 1960, joint appendix filed.

October 21, 1960, transcript of record filed.

December 6, 1960, brief for petitioner filed.

December 22, 1960, brief for respondent filed.

January 11, 1961, appearance of Samuel M. Singer, Attorney, National Labor Relations Board, entered for the petitioner.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—

January 11, 1961

January 11, 1961, (January Term, 1961) cause came on to be heard before Sobeloff, Chief Judge, and Haynsworth and Boreman, Circuit Judges, and was argued by counsel and submitted.

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

*On Petition for Enforcement of Orders of the
National Labor Relations Board*

Argued January 11, 1961

Before SOBELOFF, Chief Judge, and HAYNESWORTH and
BOREMAN, Circuit Judges.

Samuel M. Singer, Attorney, National Labor Relations Board, (Stuart Rothman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Solomon I. Hirsh, Attorney, National Labor Relations Board, on brief) for Petitioner, and Robert B. Bair (Venable, Baetjer & Howard on brief) for Respondent.

[fol. 251]

OPINION—June 3, 1961

BOREMAN, Circuit Judge:

This case is here on petition of the National Labor Relations Board for enforcement of two orders against the Washington Aluminum Company directing it to reinstate

certain discharged employees (126 NLRB No. 162) and to bargain in good faith with a union which was chosen as the collective bargaining representative only by counting the challenged ballots cast by the discharged workers in a representation election (128 NLRB No. 79). Upon a review of the whole record in this case, for the reasons hereinafter discussed, we conclude that enforcement of both orders should be denied.

The Washington Aluminum Company is engaged in the fabrication of aluminum products at a plant in Baltimore, Maryland. As part of its plant facilities, the company maintains a machine shop employing nine men, including a foreman and a shop leader. The machine shop is a rectangular structure with floor space measuring approximately forty by seventy-five feet. The shop contains two gas space heaters with a capacity of 85,000 B.T.U., one located in the aisle of the shop and the other at one end of the building. The opposite end of the shop is heated by an oil fired furnace with a capacity of 1,500,000 B.T.U. situated in an adjacent shop building designated as the "A" shop, which is equipped with ducts one of which carries heated air directly into the machine shop area. In November of 1958, an additional furnace with a capacity of 500,000 B.T.U. was installed in the "A" shop, and the two top rows of windows in the partition separating this shop from the machine shop were removed to allow additional heat from this new furnace to flow into the machine shop building.

[fol. 252] Customarily on nights and weekends, these heating units are turned off when the plant is closed, not to be turned on again until 5:00 A.M. on the morning the work force is to return. However, on cold nights and weekends, the plant watchman, one Battaglia, who is charged with the responsibility of maintaining proper heating conditions in the plant during these times, is under standing orders to turn on all the furnaces and heaters at such regular intervals as may be necessary to the maintenance of suitable temperatures throughout the plant.

On Monday, January 5, 1959, Battaglia turned on all the heaters and furnaces at approximately 1:00 A.M. and left them on for about one and one-half hours. At 5:00

A.M., he again started up the two gas space heaters in the machine shop and the smaller and newer of the furnaces in the "A" shop. He was unable, however, after several attempts, to put in operation the larger furnace in the "A" shop. When the machine shop foreman, one Jarvis, arrived for work he found the larger furnace in the "A" shop not functioning and he and Battaglia informed the plant electrician, Rose, upon his arrival at work sometime between 7:00 and 7:15 A.M., that the furnace was for some reason mechanically inoperative. This particular furnace had ceased functioning temporarily several times since its installation although it had always been easily and quickly repaired. Rose discovered on this occasion that a control switch in the back of the furnace was in a certain position which, though it would permit the blower fans to function, would keep the electrodes from igniting the furnace fire. He immediately manipulated the control to its automatic position and the furnace shortly thereafter commenced to heat up in its normal manner. This mechanical adjustment had been made by approximately 7:30 A.M. and by the time the work whistle first [fol. 253] sounded calling the employees to work.

The diminished heat output in the machine shop, due to the temporary functional failure of the large "A" shop furnace, was accentuated by the unusual weather conditions then prevailing in the Baltimore area. The temperature at 8:00 A.M. was but 15°, the high reading for the entire day was only 22° and the low reached 11° for an average reading of 17°, which was a minus 18° deviation from normal readings for the month. The low temperatures were additionally accentuated by the highest wind velocities recorded for the whole month.

Due to the extremely cold weather, the company president, one Rushton, had gone to the plant at ten o'clock on Sunday evening, January 4, to direct Battaglia to make certain that the plant's heaters and furnaces were turned on frequently during the night so as to insure proper working conditions when the employees came to work the following morning.

When the machine shop employees did report for work Monday morning between the approximate times of 7:10 and 7:30, they found the machine shop to be noticeably

and uncomfortably cold. The condition of the shop was variously described by the employees as "cold," "colder than other days," "colder than usual," "very cold," "real cold" and "extremely cold." When the first of the workmen to arrive, one Caron, the shop leader,¹ reached the [fol. 254] machine shop he went directly to the foreman's office. During the course of an ensuing conversation, the cold condition of the shop was mentioned and foreman Jarvis remarked to Caron, at some point after the other shop employees had arrived, that "if those fellows had any guts at all, they would go home." Although there was some question as to the import intended by Jarvis,² and as to the exact phrasing, there was no dispute that this statement, or one similar thereto, was in fact made. Shortly thereafter Caron went back to the machine shop work area and repeated Jarvis's remark in the presence of the other workers, none of whom had then started work. Caron thereupon told the other employees he was leaving and asked what they intended to do. He then left the machine

NOTE: So that the pertinent facts and circumstances may be fairly presented, we shall resort, at least in part, to copious footnotes.

¹ Caron's duties as "shop leader" were to assign the other workmen to the machines, to assist them and help plan their work schedules. He was not empowered to hire or fire, to grant permission for absence from work, or to allow a man time away from his work in the plant. These functions were vested wholly in machine shop foreman Jarvis and in higher management.

² Jarvis testified as to the tenor of the remark as follows:

"A. Well, we—I tried to be most frank with Mr. Caron on everything that we did. I tried to have here a man that if need be could replace me in the shop, or was fully aware of what was going on. We also worked together, as I said before; and, therefore, I was under the impression that things of this nature that we had said and had been said prior to this at various times, such as if we had a bad job, why, I think—I think one specific job, I remember, we had a landing gear we were working on. Something went wrong with it. And remarks were made to the sense that 'grab your tool box and let's go, this job is all fouled up.' Something of that nature. This was more or less our relationship. I don't know how I can dress that up any more, or make it any clearer."

shop alone but was closely followed by six of the other employees. Although there was an unwritten but well-known and long established company rule requiring that any employee leaving work first obtain permission from his foreman, and though the seven employees who walked [fol. 255] out were admittedly familiar with this rule, none sought the permission of Jarvis before leaving.³

Immediately after his conversation with Caron and shortly before the subsequent walkout, Jarvis left the machine shop to go to the plant shipping department, returning only a "few minutes after the whistle had blown" or a little past 7:30 A.M. As he entered the shop, Jarvis saw several of the men heading toward the exit. Before he had reached the departing workmen, Jarvis passed by one Tafelmaier, another machine shop employee, and requested that Tafelmaier stay at his machine, which he did. Jarvis testified that during the time of his brief remarks to Tafelmaier the seven other men had gone out of the shop and, consequently, he had no opportunity to inquire as to their reasons for leaving or to request them also to remain.⁴

³ Jarvis testified that although he had authority to grant single employees time off for part of a day, by general understanding permission for any employee to be absent from work for a period of several days, or for more than one employee to leave at the same time, except in cases of illness, would have to be granted by Wampler, the general plant foreman, or by Tarrant, the plant manager.

⁴ Although Jarvis testified that he had heard one of the departing employees yell "[w]e are going home," he firmly denied having participated in any conversation with any employees other than Tafelmaier at the time of the walkout. Employee Caron, however, testified that as he was leaving he passed Jarvis and "might" have said, "I will see you tomorrow, I am going home," receiving the reply, "Okay, Babe, I will see you tomorrow." Employee Heinlein testified that as he departed he had asked Jarvis, "Aren't you going with us," to which Jarvis answered, "You know I can't do that." Another employee, Adams, when asked if he had said anything to Jarvis before leaving, said, "I told him I am cold, Dave, I am sick, and I am going home."

The General Counsel affirmed at the hearing before the Trial Examiner that the Board would not contend that the employees

[fol. 256] The immediate result of the walkout was to leave only Tafelmaier and Jarvis himself in the machine shop. In order to complete what general plant foreman Wampler termed "critical" jobs that were at the time being processed in the machine shop, Wampler supplied Jarvis with two temporary workers who had to be taken from their normal assignments in other departments of the plant. At approximately 8:20 A.M., company president Rushton arrived at the plant and, noticing these men and the absence of the seven regular workmen as he passed through the machine shop, asked Jarvis what had occurred. When he was told the men had walked out before starting work, he said to Jarvis, "We are going to terminate them." Rushton then called Jarvis and plant manager Tarrant to an office, discussed the situation with them and told them of the final decision to discharge all of those who had walked out. Four of the men, Adams, George, Hovis and Olshinsky, were sent telegraphic notices of dismissal by the company personnel officer. When employee Affayroux returned to the machine shop at 9:00 o'clock that same morning from a nearby restaurant where he had gone for a cup of coffee, Jarvis personally informed him of his discharge. The remaining employees, Heinlein and Caron, were then contacted and notified by telephone.

Although there was some question as to the actual time at which a final and effective decision to terminate the [fol. 257] men had been reached,⁵ they were undeniably

participating in the walkout had obtained permission therefor from any source as was required by company rule.

Moreover, accepting the above remarks as having in fact been made, it should be noted that only the third referred in any manner to the heating condition in the machine shop. None of them embodied a query as to the cause or probable duration of the cold, none alluded to the cold as the specific cause of the walkout and not one contained any form of a request that the condition be either investigated or alleviated.

⁵ Foreman Jarvis testified that when company president Rushton first arrived in the machine shop at approximately 8:30 A.M. and had noticed the absence of the regular workmen, he had said, "these people left the premises unauthorized, and I want them discharged." Jarvis further testified that he and Wampler then held a meeting with Rushton to discuss the discharges before the men were notified of their terminations. Wampler testified

discharged within a short time after the walkout and before replacements had been hired. Although there was further dispute as to the company's real motivation for the discharges,* the Trial Examiner concluded that the

the decision to discharge was made between "9 and 9:30" by himself, Jarvis and Rushton. Rushton testified that when he noticed the absent men in the machine shop he stated to Jarvis, "Dave if they have all gone, we are going to terminate them," but had added, "[w]ell, before you do that now, I want a list of these people, whoever they are." Rushton further stated he first discovered the men had left without their foreman's permission at the meeting with Jarvis and Wampler and that the final decision to discharge was reached about 9:00 A.M., just before he left the plant.

* The Trial Examiner briefly found that Rushton's testimony that "the real reason [was] because they didn't inform the foreman of the action they were taking," was "merely the statement of an afterthought." The above quoted statement of Rushton's was elicited during the following colloquy with the Trial Examiner:

THE WITNESS [Rushton]: Well, the real reason of course is that I was very upset at the foreman for not getting the information from those fellows, not getting the—

TRIAL EXAMINER: Is that the reason you discharged the men, because the foreman didn't get the information?

THE WITNESS: The real reason is because they didn't inform the foreman of the action they were taking.

TRIAL EXAMINER: Is that the reason you discharged them?

THE WITNESS: That, *plus* the disciplinary action." (Emphasis supplied.)

Jarvis testified that Rushton had stated he would discharge the men because "they had left the premises unauthorized. And this curtailed our operation. And this they were discharged for." Wampler, the general foreman, who also participated in the discharge discussions, further testified as follows:

"Q. Why did you fire these men?"

A. For violating plant rules, leaving the plant without permission, and to maintain discipline.

TRIAL EXAMINER: Wait a minute. Violating plant rules and leaving the plant without permission is the same thing, isn't it?

THE WITNESS: Well, they left without the foreman's permission.

TRIAL EXAMINER: All right. They left without permission. And they violated the plant rule when they left without

[fol. 258] employees participating in the walkout had been engaged in a "concerted refusal in the course of their employment to perform any services for Respondent [the company] in protest of certain working conditions, to wit, the failure of Respondent to supply adequate heat in their place of employment." Since the men were thus determined to have been "economic strikers," the Trial Examiner then held the discharges made before replacements were hired unlawful under section 8(a) (1) of the act, and that the employees therefore retained their employee status and were entitled to reinstatement with back pay.

The Board affirmed the Trial Examiner's report, modifying it only by adding particular emphasis to the testimony of employee Hovis to the effect that "[w]e all got together and thought it would be a good idea to go [fol. 259] home; maybe we could get some heat brought into the plant that way;" the testimony of three of the discharged employees as to prior complaints about cold conditions in the machine shop; and the circumstance of the men leaving in a body, all at about the same time. There was one element in the intermediate report, however, not touched upon or developed by the Board in its opinion, which we believe points up the crucial factor precluding enforcement of the Board's orders in this proceeding.

permission, didn't they? It is the same thing, isn't it?

THE WITNESS: Yes, I would say so.

TRIAL EXAMINER: And to maintain discipline, you didn't fire them for that?

THE WITNESS: No, not for that reason.

TRIAL EXAMINER: Then you fired them because they left the plant?

THE WITNESS: Correct.

TRIAL EXAMINER: Without permission?

THE WITNESS: "Correct."

Beyond concluding that one of Rushton's several statements was an "afterthought," the Trial Examiner held only that "by their [the employees] concerted activity * * * [they] were economic strikers * * * that by reason of their being discharged before they were replaced, they continued to so remain and were therefore unlawfully discharged employees * * * The Trial Examiner made no further findings as to the company's reasons for the discharge and the Board's decision is silent on the point.

In the text of his report, the Trial Examiner alluded only briefly to the presentation or specification of a demand or grievance by the employees by noting "the fact that they [the employees] were discharged before they had an opportunity to formally elect a committee to deal with the Respondent [the company] with respect to the adjustment of their grievance (as argued by the Respondent) is of no moment." While we do not intimate that it should ever be thought that employees, not represented by a union are required to effect some sort of formal organization of a grievance committee of their fellows to submit their claims to management prior to a concerted protest of employer practices thought to be unfair, the record here before us manifests a conspicuous and total absence of any action on the part of the employees to attempt to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company prior to the walkout.

There is little question that working conditions in the company's machine shop were less than comfortable on the morning of the walkout. The employees all testified that the shop on this morning was "cold" if not "extremely cold"; employee George testified that when he arrived at [fol. 260] work that day he found a small icicle on one of the pipes of the water cooling system of a welding machine; employee Tafelmaier, the one worker not joining in the walkout, worked that morning until about 10:30 wearing his overcoat; foreman Jarvis testified that the shop was "a bit uncomfortable" until around 10:00 A.M. and that it was not until lunch time or shortly thereafter that the men then working in the shop removed extra coats or sweaters they had worn during the morning. In addition, Caron testified that shortly before the walkout he had observed his fellow workers "huddled" together and "shivering" in the cold.

It is apparently undisputed that the coldness was in great part attributable to inclement weather on one of the coldest days experienced during the winter of 1958-59, and that the abnormal freezing temperatures were intensified by the most severe winds of the entire month. Moreover, it is clear the company was fully aware of its

responsibilities to combat these conditions for, although the plant watchman was under standing instructions as stated, the company president himself visited the plant the evening before the walkout to insure that adequate heat would be provided the employees the following morning. While the watchman was unable to fully carry out these orders, this was undeniably due to the unexpected mechanical failure of one of the plant furnaces, a condition beyond the control of the company and one quickly and effectively remedied. The plant electrician attended to the matter immediately after his arrival at work, the furnace was operative by the time the men were to have started work at 7:30 A.M., it was heating to its full capacity within five to eight minutes thereafter, within twenty minutes heat from its directional ducts was being forced forty or fifty feet into the machine shop, and before lunch time this area had been heated to normal working temperature. [fol. 261]

There was some variation in the testimony of the employees as to the real reason for the walkout.⁷ But even if it be assumed their sole purpose was to protest the low temperature of their place of employment, we do not believe their actions should be considered a protected activity under the facts and circumstances here presented. One of the fundamental policies of the National Labor Relations Act, 29 U.S.C. § 151 (1958), is to secure industrial peace and prevent strife and disruption by en-

⁷ Caron testified that just prior to leaving he turned to his fellow workers and said, "[w]ell, Dave told me if we had any guts, we would go home," and "I am going home, it is too damned cold to work"; Heinlein testified that upon hearing this statement of Jarvis's he answered by stating "'[i]t is all right with me, I am going home too'"; George and Olshinsky also stated they left in part because of Caron's repetition of Jarvis's remark and, additionally, because of the cold; Adams also stated he left because of the remark and, although he had not sought permission to leave, for the further reason that he had been running a fever which subsequently led him to obtain a doctor's certificate of illness; Affrayroux walked out because of the cold and because he wanted to "stick" with the others; and Hovis because he had thought that "maybe we could get some heat brought into the plant that way."

couraging negotiation and peaceful procedure for the attempted settlement of the demands of a party. That is not to say that employees may not, under any circumstances, exert concerted pressure on their employer in their efforts to gain compliance with their demands. However, the office of a demand as a condition upon the use of concerted pressures is well recognized. As this court stated in *Jeffery-De Witt Insulator Co. v NLRB*, 91 F. 2d 134, 138 (4th Cir. 1937):

“ * * * ‘A strike,’ in such common acceptation, is the act of quitting work by a body of workmen for [fol. 262] the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused.”

An important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer.

In the instant case, none of the concerned employees made any statement before, during or subsequent to the walkout which alluded in any way to a demand that measures be taken to investigate or alleviate the cold in the machine shop.* Each of the employees admitted he had

* This general principle is discussed in *RESTATEMENT, TORTS* § 797, comment a (1939), as follows:

“A strike is a concerted refusal by employees to do any work for their employer * * * until the employer grants the concession demanded. * * * [I]t is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will.” (Emphasis supplied.)

* Attempting to develop the theory of a long standing labor dispute, the Board cited testimony of the employees consisting of the following responses to questions as to whether they had ever complained of their working conditions: Heinlein answered, “I have frequently on occasion remarked to Mr. Rushton as he went through the building, and also to Mr. Esender [a former production manager but production co-ordinator at the time of the walkout], and I think Bill Campbell [also a former production manager employed in the estimating department when the

[fol. 263] made no attempt to ascertain the cause of the condition, and all testified they were unaware of the temporary failure of the larger "A" shop oil furnace and did not know it had been effectively repaired *by the time they were to have started work*. Had they made some effort to request improvement of the condition in the machine shop prior to abandoning work, it is evident from the record their efforts would have been rewarded. While the shop was undeniably cold at the time the men left, conditions in the shop gradually improved, as a result of the furnace repair, to the point where those then in the shop were working in normal comfort. Not only had the company, on its own initiative, done all that it could to relieve the cold *before* the walkout, there is nothing in the record to indicate that a requested adjustment of the problem could not otherwise have been effected. Indeed,

walkout occurred]. When asked when he had so complained, Heinlein answered, "It may have been two or three times during the six months before that. Maybe a year before that. Maybe two years"; George said he had complained to "Mr. Esender and Mr. Jarvis," but amplified this by explaining that he had simply asked "why the large furnace wouldn't put out more heat"; and Caron testified, "I used to talk to Dave [Jarvis] that it was cold and miserable" but he could not recall any specific occasion when he had in fact so complained.

Conversely, foreman Jarvis testified "the complaints were in line of general griping that you have in the lot. It is either too cold or too hot or something of that sort," and stated that he had never received a specific request for management action. Tarrant and Wampler both testified they had never heard specific complaints about the cold or received requests concerning such conditions in the shop but had only heard "conversation" about weather conditions in general. The only other member of management testifying on the point, president Rushton, described the employees' comments as "gripes" such as "'It is cold today.' No more than we have talked about the heat last week, it has been pretty unbearable."

Accepting the prior "complaints" or "gripes" at full face value, it is notable that not one, with the exception of George's query "why the large furnace wouldn't put out more heat," was of the nature of a demand or request of the company. Moreover, as will be developed, had a question similar to George's prior inquiry been made on the day of but before the walkout, the lack of necessity for such a disruptive protest would have been readily apparent.

the refusal of the employees to seek explanation of the cause of the condition and a correction is heightened by the unquestioned privilege they all possessed, that is, to simply request the plant maintenance man to turn up the thermostats on any or all of the various heaters and furnaces the men knew to be functioning at the time of their walkout.

[fol. 264] In none of the cases cited by the Board in this proceeding was there the total absence of a demand by the protesting employees as is here apparent.¹⁰ In the instant

¹⁰ In *NLRB v. Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957), the employees had complained of excessive heat through their union steward and the union president to both their foreman and management and, before walking out, they again sought permission to leave work through their union steward and president; in *NLRB v. Solo Cup Co.*, 237 F. 2d 521 (8th Cir. 1956), the employees shut down their machines and immediately demanded discussion with the plant manager concerning the discharge of a fellow worker and, when informed he would soon talk with them, they resumed their work; in *NLRB v. Cowles Pub. Co.*, 214 F. 2d 708, 710 (9th Cir. 1954), the court found "there is no dispute that the strike was in support of specified demands for a raise in pay and for improved working conditions, submitted to the employer prior to striking"; in *NLRB v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (6th Cir. 1953), *aff'd on rehearing*, 210 F. 2d 824, 825 (1924), the court found that "[m]anagement was advised of the reason for the stoppage and gave no satisfactory response"; in *Modern Motors, Inc. v. NLRB*, 198 F. 2d 925 (8th Cir. 1952), prior to quitting work over a disputed bonus payment, the employees discussed their grievance directly in a meeting with the company president; in *Cusano v. NLRB*, 190 F. 2d 898 (3d Cir. 1951), before leaving work to protest the discharge of a fellow worker, the employees had negotiated for a consent election and had taken an open strike vote, the very knowledge of which had prompted the employer's president to address them in a body at the plant; in *NLRB v. Kennametal, Inc.*, 182 F. 2d 817 (3rd Cir. 1950), the employees stopped work and went directly to the company cafeteria where they discussed a demanded wage increase with their company president; in *Gullett Gin Co. v. NLRB*, 179 F. 2d 499 (5th Cir. 1950), the employees were discharged in the very midst of a meeting with management discussing a proposal for increased wages; in *Home Beneficial Life Ins. Co. v. NLRB*, 159 F. 2d 280 (4th Cir. 1947), the employees' union had extensively negotiated working hour arrangements and the concerted activities were commenced only after the employer had refused to accede to the

case, without any sort of demand on the company, the involved employees summarily left their place of employment. Under such circumstances, it would be to disregard the obligation to present a demand for peaceful settlement, and contrary to the fundamental purposes of col-[fol. 265] lective bargaining, to hold the employees' unilateral action a protected concerted activity. Where certain employees had refused to enter their place of employment without first making known the reason for such refusal or requesting any concession of their employer, in *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457, 465 (2d Cir. 1958), the court said:

"The duty to bargain collectively is but a facet of the underlying purpose of the entire Act in promoting and encouraging the peaceful settlement of labor disputes. Placing the activity here under the broad protection of section 7 would clearly frustrate that purpose. To hold that those engaging in a strike had an unfettered right to refuse not only to discuss their grievances but even to name them would, far from promoting the peaceful settlement of labor disputes, inject a judicially fashioned element of chaos into the field of labor relations. 'The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace.'"

"We do not hold as a matter of law that employees engaging in concerted activities must give formal or even informal notice of their purpose. However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they choose to remain silent, bear the risk of being discharged."

union demands and after the union had given notice of the pending concerted actions; and in *Fifth Carpet Co. v. NLRB*, 129 F.2d 633 (2d Cir. 1942), the employees left work only after they had negotiated for certain guaranteed overtime pay with the shop chairman and their foreman, and after management had refused the requested guaranty.

We believe this principle particularly applicable where, as here, the cause of the objectionable condition was largely fortuitous and substantially beyond the control of [fol. 266] the employer and was of but brief duration, and where, even beyond the neglected opportunity for inquiry, negotiation and settlement, effective measures had been taken by the employer before the protest was even staged. The company was afforded no opportunity to avoid the work stoppage by granting a concession to a demand of the employees.

The National Labor Relations Act has for one of its objectives the protection of employees in freely negotiating concerning unsatisfactory plant conditions and other conditions of employment without fear of reprisal, but the purpose of the act was not to guarantee to the employees the right to do as they please under any given set of circumstances and in total disregard of the obligations of their employment. In the instant case, regular production schedules involving "critical" purchase orders were disrupted; to do the work of those who absented themselves, employees were transferred from their regular jobs in other departments and there is no evidence that any of those so substituting suffered any ill effects other than temporary discomfort. With no reasonable justification, the employees left their jobs without first having obtained the necessary permission. In a situation where several employees, unprotected against the elements, left work early with the permission of the foreman and were later discharged by higher management on the basis of the foreman's report that they had left without permission, the Board held that since the basis for the discharges was a good faith belief that permission to leave had not been obtained, the discharges could not be said to have been discriminatory or an unfair labor practice in violation of the act. *Scott Lumber Co.*, 109 N.L.R.B. 1373 (1954). In the instant case, the company is not to be held guilty of [fol. 267] an unfair labor practice for having discharged employees who had in fact left their jobs without permission in violation of a well known company rule. Under these circumstances, we conclude that the discharges were not, in any sense, discriminatory and were not without

justification; also, by reason of their failure to present a grievance to the company, the employees were not engaging in a protected activity since they were not acting in concert for their mutual aid or protection in withholding their services.

The final issue presented is the Board's finding that the company had refused to bargain in good faith with a union elected by the determinative counting of challenged ballots cast by four of the employees previously discharged for having participated in the January 5, 1959, walkout in violation of sections 8(a)(1) and 8(a)(5) of the act.¹¹ Having previously concluded the men casting

¹¹ The first tally made of the March 17, 1959, consent election resulted in 68 votes in favor of the proposed union, the Industrial Union of Marine & Shipbuilding Workers of America, and 70 votes against such union with five votes challenged and one held void by the Board agent. Four of the challenged ballots were those cast by employees discharged for participating in the January 5, 1959, walkout, Affayroux, Heinlein, Hovis and Olshinsky. The Board's Regional Director later recommended the allegedly void ballot be counted as a "Yes" vote in favor of the union. The revised tally then stood at 69 votes in favor and 70 votes opposed to the union. The Regional Director also recommended that the ballot of one Dicus, who was initially challenged as being a supervisor under the terms of the act, be counted. With the addition of the Dicus ballot, the result would then have been either 69 to 71 against union representation or would have been a tie vote. In either case, the union would not have received a majority of the ballots cast and the Board acknowledges the result of the election depends on the validity of the four ballots cast by the above walkouts. The Regional Director recommended that these challenges be determined together with the unfair labor practice charges pending in respect to the voters' discharges. When the Board on March 31, 1960, held that the discharges had in fact been unfair and that the voters had thus retained the status of employees through the time of the election, all challenged ballots were tabulated resulting in a final count of 73 votes in favor of the union with 71 opposed. The union was certified on April 13, 1960, and on April 21 the company, by letter to the union, stated that "pending the outcome" of the instant proceeding, it was "not in a position to sit down with the Union and negotiate a contract." On August 16, 1960, the Board held the company's letter constituted an admission of a refusal to bargain in good faith, and further affirmed its prior decision that employees participating in the walkout had been unfairly discharged.

[fol. 268] these determinative ballots were properly discharged for cause on January 5, 1959, prior to the eligibility period for the representation election, the week ending February 2, 1959, it necessarily follows that the union's status as the certified representative of the employees, dependent as it is upon the validity of these ballots, must fail. Since the union has thus failed to carry the representation election, the Board's order directing the company to bargain in good faith with that union will be denied enforcement, and the Board's certification of that union will be vacated and set aside. *Ohio Power Co. v. NLRB*, 176 F. 2d 385, 388 (6th Cir. 1949).

Enforcement denied.

[fol. 269] SOBELOFF, Chief Judge, dissenting:

The Labor Board's position is neither unsupported by the record nor unreasonable, and I find no warrant for refusing enforcement of its order. The evidence at the hearing clearly furnishes a foundation for the Board's conclusion that the walkout of the seven employees constituted concerted activity protesting the unsatisfactory working conditions in the machine shop. Whatever notice or demand upon the employer might be required in other circumstances need not be decided, for no additional notice or demand was necessary under the well supported findings of this case.

The employer's contention that the activities of these men did not amount to concerted activity is refuted by the findings of the Examiner and the Board, based upon testimony of the employees. The Board states:

"The Trial Examiner found, and we agree, that the Respondent violated Section 8(a)(1) in terminating the employment of the 7 complainants who were engaged in protected concerted activity under the Act. We rely, *inter alia*, upon the following: the credited testimony of employee Hovis that 'We all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant

that way;' the credited testimony of employees Heinlein, Caron and George as to previous complaints made to the Respondent's foreman over the cold working conditions, and to the effect that the men left on the morning of January 5 in protest of the coldness at the plant; and the evidence that the 7 complainants left the shop at approximately the same time."

[fol. 270] My brethren apparently agree that if there had been a notice or demand, the walkout would be concerted activity protected by the Act. However, the court denies enforcement because, it is said, "An important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer." There was, however, such notice to the employer in the instant case.¹ On a number of earlier occasions complaints had been made about the lack of heat in the shop. On the morning of the walkout, employee Caron discussed the coldness with the foreman, Jarvis. Also, as the men were walking out, they told Jarvis that it was too cold to remain and work.

Furthermore, the employer, through its foreman, indicated that the men should go home. Jarvis told Caron: "If those fellows had any guts at all, they would go home." When Caron reported back to the men, he told them that the foreman had suggested that they leave. Under these circumstances it is plainly improper to upset the Board's decision.

¹ That notice of the reasons for concerted activity need not follow any prescribed form is clearly shown by the second of the two paragraphs quoted in the court's opinion from *N.L.R.B. v. Ford Radio & Mica Corp.*, 258 F.2d 457, 465 (2nd Cir., 1958). There, unlike the present case, management did not precipitously fire employees. It took action only after futile attempts to learn the cause of the employees' grievance. In the instant case, by no stretch of the facts was management "placed in the position of having to guess at its peril the purpose behind the strike." *id.*, page 464.

[fol. 271]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

VS.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

*On Petition for Enforcement of Orders of the
National Labor Relations Board*

JUDGMENT—Filed and Entered June 3, 1961

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of certain orders issued by it against the Washington Aluminum Company, Inc., its officers, agents, successors, and assigns, on the 31st day of March, 1960, and the 16th day of August, 1960, in proceedings before the said Board known upon the records of the Board as Cases Nos. 5-CA-1498 and 5-CA-1696, respectively; upon the answer of the respondent; and upon the transcript of the record in said proceedings, certified and filed in this court; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition for enforcement be, and it is hereby, denied, and that the Board's certification of the union be vacated and set aside, in accordance with

[fol. 272] the opinion of the Court filed herein.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

I dissent:

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

July 5, 1961, certified copy of decree transmitted to the
National Labor Relations Board.

[fol. 273] Clerk's Certificate to foregoing
transcript omitted in printing

[fol. 274]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

**ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—August 30, 1961**

**UPON CONSIDERATION of the application of counsel for
petitioner,**

**IT IS ORDERED that the time for filing petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including**

October 2nd, 1961.

**/s/ Hugo L. Black
Associate Justice of the Supreme
Court of the United States.**

Dated this 30th day of August, 1961.

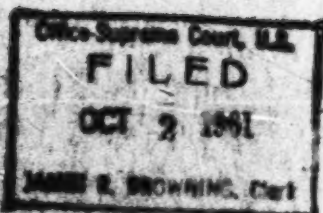
[fol. 275]

SUPREME COURT OF THE UNITED STATES**No. 464, October Term, 1961****NATIONAL LABOR RELATIONS BOARD, PETITIONER****VS.****WASHINGTON ALUMINUM COMPANY****ORDER ALLOWING CERTIORARI—December 4, 1961**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.



No. — 464 —

In the Supreme Court of the United States

October Term, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

WASHINGTON ALUMINUM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit entered in this case on June 3, 1961.

OPINIONS BELOW

The decision of the court of appeals (App. B, *infra*, pp. 17-37) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 1-21)¹ are reported at 126 NLRB 1410 and 128 NLRB 643.

¹ "R" refers to the portions of the record printed as an appendix to the brief filed by the Board in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1961 (App. B, *infra*, pp. 38-39). On August 30, 1961, Mr. Justice Black entered an order extending the time for filing a petition for certiorari to and including October 2, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether employees who walk out in concert to protest objectionable working conditions, without first affording the employer a fresh opportunity to correct them; must be denied the protection which Section 7 of the National Labor Relations Act affords to those who engage in "concerted activities".

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in Appendix A, *infra*, pp. 14-16.

STATEMENT

I.

THE BOARD'S FINDINGS OF FACT

The day shift in the respondent's machine shop consisted of nine men—a foreman and eight machinists (R. 12; 26, 32). Heating for the shop was supplied primarily from an oil-fired furnace with a capacity of 1,500,000 BTU (R. 13; 51-52). In addition, the shop contained two smaller gas-fired space heaters with a heating capacity of 85,000 BTU (R. 52). Ordinarily,

the furnace was shut down at night and on week ends (R. 13; 64), but in severe cold weather the night watchman was instructed to turn on the heat at regular intervals "to protect and maintain above-freezing conditions in the building" (R. 14; 54). The shop itself was not insulated (R. 38) and had a number of doors to the outside which were opened and closed during working hours (R. 52).

At various times prior to January 5, 1959, employees in the machine shop had complained to company officials about the cold in the shop during winter months (R. 1-2). Thus, one employee had, at times, spoken to the president of the company about the coldness of the shop (R. 32). Another employee had, "on several of the cold mornings," complained to the foreman, Jarvis, about the insufficient heat coming from the main furnace (R. 35-36). Another employee testified that "on cold days * * * a lot of men worked with their heavy sweaters on or jackets" (R. 25), and that just two weeks prior to the events described below all the men had complained to Jarvis about the "cold and miserable" conditions existing in the shop at that time (R. 26).

On the morning of January 5, because of a cold spell and the inability of the watchman to start the furnace, employees coming to work found the machine shop to be very cold (R. 2, 16; 32-33, 50-51, 53).² One employee noticed that an icicle had formed in the drainpipe of the spot welder which he operated (R.

² The average temperature that day was 17 degrees above zero, which was 18 degrees below the normal for that date (R. 90).

36). When Caron, another employee, arrived, he went into the foreman's office to get warm, as was his custom, but on this morning the office was no warmer than the rest of the shop (R. 12; 27). Caron and Jarvis discussed the coldness in the building, and then, when "a couple of the fellows walked by * * * huddled," the foreman told Caron, "If those fellows had any guts at all, they would go home." (R. 12; 27.)

At 7:30 a.m. the work buzzer sounded, and Caron walked into the machine shop. A group of employees, who were usually working by this time, remained "all huddled there, shaking a little, cold." Caron said to them, "Well, Dave [Jarvis] told me if we had any guts, we would go home * * * I am going home, it is too damned cold to work" (R. 12; 27, 30). Caron then asked the men what they were going to do. The employees started talking among themselves, saying, "Well, let's go." As Caron started out of the plant, the others followed behind him (R. 12; 30). According to one employee's testimony, "they [the employees] said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way" (R. 1; 44-45). As Caron was leaving, he saw Jarvis and said, "Dave, it is too cold, I am going home" (R. 12; 28).

When Arthur Wampler, the general foreman, arrived at the plant between 7:45 and 8:00 in the morning, Jarvis informed him that all but one of the men had walked out because it was too cold (R. 64). He obtained two employees from other shops in the

plant and put them to work in the machine shop (R. 65).²

Fred N. Rushton, president of the respondent corporation, arrived at approximately 8:20 a.m. (R. 14; 69). Upon noticing that no one was in the machine shop, Rushton said, "We can't have that, Dave * * * [i]f they have all gone, we are going to terminate them" (R. 16; 69). Rushton, Wampler and Jarvis thereupon formally decided to discharge the men (R. 15-16; 69-70). All seven men were notified that day (R. 12, 14-15; 28-29, 33, 58). No replacements were hired until sometime later (R. 15; 61).

II

THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found, as did the Trial Examiner, that the walkout of the seven employees was a concerted activity in protest against the respondent's failure to supply adequate heat in their place of employment, and that it was thus protected by Section 7 of the Act. Accordingly, the Board concluded that the respondent's dismissal of the employees for engaging in the walkout was a violation of Section 8(a)(1) of the Act (R. 1-2, 17). In reaching this conclusion, the Board noted that the employees had

² In the meantime, the respondent's electrician had arrived, and the foreman and the night watchman had informed him that the furnace was mechanically inoperative (R. 51, 53). The electrician corrected the furnace malfunction and it began to work properly at approximately 7:30 a.m. (R. 67). It was not, however, until noon that the temperature in the machine shop returned to normal (R. 59, 68).

in the past complained to the respondent's foreman about the coldness in the plant; that the employees talked the matter over before the walkout; and that they had left the shop in protest over working conditions (R. 1-3).

The Board's order, insofar as here relevant,⁴ required the respondent to cease and desist from the unfair labor practices; to offer reinstatement to the seven discharged employees; and to make them whole for any loss of wages they may have suffered by reason of the respondent's discrimination against them (R. 2-4).

III

THE DECISION OF THE COURT OF APPEALS

The court below set aside the Board's order because none of the employees had, immediately prior to the walkout, made any specific request that the employer rectify the objectionable conditions in the plant. In the court's view, an "important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer" (App. B, *infra*, pp. 28-29).

⁴The Board also found that the respondent violated Section 8(a)(5) of the Act by refusing to bargain collectively with the Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, the certified bargaining representative of the respondent's employees. This finding depends on the validity of the Section 8(a)(1) findings, since the Union's status as a majority representative turns on the ballots cast in the Board election by four of the seven discharged employees. If the four employees were properly discharged prior to the election, they would not have been entitled to vote; if improperly discharged, they were entitled to vote.

Chief Judge Sobeloff dissented (App. B, *infra*, pp. 35-37).

REASONS FOR GRANTING THE WRIT

The court below has rendered a novel and, we believe, erroneous interpretation of the scope of the protection granted to "concerted activities" by Section 7 of the National Labor Relations Act—an interpretation which is in direct conflict with *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6), rehearing denied, 210 F. 2d 824, certiorari denied, 347 U.S. 976. The importance of the question presented transcends the facts of the particular case and even the problem of the protection to be accorded those who engage in spontaneous unorganized strikes, for the ruling below rests upon a misconception of the general standards to be applied, and also of the proper role of the courts of appeals in determining the extent of the protection accorded by Section 7.

These are key issues in labor law because the scope given to the phrase "concerted activities" covers not only the protection available under the National Labor Relations Act to employees who resort to economic pressure against their employer, but also the extent of federal preemption against state regulation.^{*} Accordingly, the decision below merits review for reasons similar to those which led the Court to grant certiorari in *National Labor Relations Board v. Local Union No. 1229, Electrical Workers*, 346 U.S. 464.

^{*} *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245.

1. In *National Labor Relations Board v. Southern Silk Mills, Inc.*, *supra*, the Court of Appeals for the Sixth Circuit held that an employer committed an unfair labor practice by discharging employees who engaged in a spontaneous walkout, without notice to their employer, in protest against the excessive heat in a factory building. The walkout was held to be a concerted activity for mutual aid or protection within the meaning of Section 7 of the National Labor Relations Act. In the present case the court below refused similar protection to employees who engaged in a spontaneous walkout in protest against the excessive cold in a factory building. The conflict between the circuits should be reconciled by this Court. Sudden spontaneous strikes are not uncommon, and have heretofore been rather uniformly treated as concerted activities protected by Section 7, although some of the cases can be distinguished upon their precise facts.*

* See, e.g., *National Labor Relations Board v. J. I. Case Company*, 198 F. 2d 919 (C.A. 8); *National Labor Relations Board v. Knight Morley Corp.*, 251 F. 2d 753 (C.A. 6), certiorari denied, 357 U.S. 927; *National Labor Relations Board v. Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3); *Gullett Gin Co. v. National Labor Relations Board*, 179 F. 2d 499 (C.A. 5), reversed on other grounds, 340 U.S. 361; *National Labor Relations Board v. Solo Cup Co.*, 237 F. 2d 521, 525-526 (C.A. 8); *National Labor Relations Board v. Cowles Publishing Co.*, 214 F. 2d 708, 711 (C.A. 9), certiorari denied, 348 U.S. 876.

In some of these cases, as the court below noted (App. B. *infra*, pp. 30-31, n. 10), the grievance may have been discussed with the employer prior to the work stoppage. However, none of the decisions turned on this factor. The decisions rested, rather, on the broad ground that the Act does not require employees to go through any formality before they may take concerted

2. It is the ground of the decision below that gives this case a significance transcending the problem of spontaneous walkouts. The court of appeals held that this peaceful walkout by a group of employees protesting the employer's repeated failure to supply adequate heat was not a protected concerted activity because "without any sort of demand upon the company the involved employees summarily left their place of employment" (App. B, *infra*, p. 31). Thus, the decision necessarily makes the statutory right to engage in what are indisputably peaceful, concerted activities as a matter of fact depend, as a matter of law, upon the reviewing court's judgment as to whether the employees conducted themselves wisely and fairly in omitting preliminary discussion with their employer upon the morning in question, although they had unavailingly complained on prior occasions.

The introduction of such highly subjective judgments into the interpretation and application of "concerted activities" runs contrary to a basic thesis of modern labor legislation. Prior to the 1930's most courts treated the concerted action of employees as a tortious and enjoined conspiracy whenever they re-
 action for their mutual aid and protection. Nor is *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457 (C.A. 2), to the contrary as the court below seems to have assumed. There, unlike the present case, the circumstances were such as to afford the management no inkling as to the reason for the strike, and its repeated efforts to ascertain the reason from the strikers were met with evasion. (See App. B, *infra*, p. 36, n. 12, Sobeloff, C. J., dissenting). The Second Circuit carefully distinguished cases of spontaneous strikes in which "the circumstances were such that the management must have known the issues." 258 F. 2d at 464.

garded the means or objectives as "unlawful"; the only standard of "lawfulness" was the judicial view of the desirability or undesirability of the activities in question. The Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. 101 *et seq.*) sought to eliminate these subjective judgments from the federal courts' disposition of cases arising out of labor disputes. The guarantee of a right to engage in concerted activities provided by Section 7 of the National Labor Relations Act was intended to deprive employers of the weapon of this conspiracy doctrine. *International Union, United Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 257-258. The phrase "concerted activities" in Section 7 is closely related to the similar terminology in the Norris-La Guardia Act. See *American News Co.*, 55 NLRB 1302, 1314 (dissenting opinion).

In prior interpretations both the National Labor Relations Board and the reviewing courts have given effect to labor history by avoiding approaching the interpretation of "concerted activities" in a manner which would invite scrutiny of the fairness or unfairness, the wisdom or unwisdom, or the desirability or undesirability of peaceful activities which are concerted in fact and do not violate a clear legal mandate. Thus, strikers and pickets have been denied the protection of Section 7 because of their objective only when the objective was to accomplish a violation of the National Labor Relations Act or a related federal statute.¹ Section 7 has been held to protect all other

¹ *Thompson Products, Inc.*, 70 N.L.R.B. 13, vacated, 72 N.L.R.B. 886 (1947); *American News Co.*, 55 N.L.R.B. 1302 (1944).

cases of concerted activities except those which were unlawful,⁹ involved violence¹⁰ or breach of contract,¹¹ or were plainly indefensible by all recognized standards of conduct—slow-downs,¹² a series of unannounced quickie strikes¹³ or the refusal to obey orders while drawing pay,¹⁴ for example.

The conduct of the employees in the instant case was peaceful, lawful, and substantially similar to other spontaneous walkouts. The work stoppage was to protest the fact that working conditions were too cold. Such a protest, which is the most elementary form of concerted action for "mutual aid or protection," is not inconsistent with the express provisions or basic policy of the Act, nor with the policy of any other federal statute. Nor can it fairly be said that, for the employees to walk out in these circumstances, without first giving the employer an opportunity to

⁹ *Southern S. S. Co. v. National Labor Relations Board*, 316 U.S.

31.

¹⁰ *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240.

¹¹ *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332; *Hazel-Atlas Glass Co. v. National Labor Relations Board*, 127 F. 2d 100 (C.A. 4).

¹² *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950).

¹³ *International Union, UAW, AFL v. Wisconsin E.R. Bd.*, 336 U.S. 243.

¹⁴ *National Labor Relations Board v. Montgomery Ward & Co.*, 157 F. 2d 486 (C.A. 8). *National Labor Relations Board v. Local Union No. 1829, IBEW*, 346 U.S. 464, falls within this category of indefensible conduct because of the union's failure to inform the public of any connection between the pending labor dispute and a published attack upon the employer's product. The Court accordingly found the attack "as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending." 346 U.S. at 477.

rectify the objectionable conditions, is so indefensible, when evaluated in the light of industrial realities and the possible injury to employer interests, as to warrant a forfeiture of the Act's protection. Where a working condition suddenly becomes intolerable, it may not always be possible for the employees to give advance notice before walking out. And, even where such notice is possible, the employees may nevertheless believe that a spontaneous work stoppage is the most effective means of emphasizing the seriousness of their grievance and of exerting the maximum pressure on the employer to alleviate it. Accordingly, the holding of the court below that the activity was unprotected rests upon no discernible standard other than its subjective judgment that collective bargaining would be more fair or orderly if the employees had continued at work and given the employer another chance to correct their working conditions.

3. Even if such judgments were permissible in the interpretation and application of Section 7, they should be made by the National Labor Relations Board and not a reviewing court. Judging the propriety of employees' conduct from the standpoint of good labor management relations involves the exercise of expertise and the formulation of labor policy.¹⁴ If additional procedural obligations are to be imposed upon collective bargaining, such as the giving of notice before a strike, the evaluation of what is necessary should be the task of the Board. As Justices Frankfurter, Black and Douglas pointed out in *Na-*

¹⁴ Such judgments also properly involve the Board's appraisal of particular facts. In the present case, for example, the Board

tional Labor Relations Board v. Local Union No. 1229, Electrical Workers, 346 U.S. 464, 480, "It is for the Board, in the first instance, to make these evaluations," in the interpretation and application of the term "concerted activities." A court of appeals should not reverse the Board's determination if it is a reasonable application of the statutory mandate. Cf. *National Labor Relations Board v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters*, 353 U.S. 87, 96-97. The court below departed from this accepted standard of judicial review.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1961.

could reasonably conclude that the employer already had had adequate notice of the employees' complaints about insufficient heat on cold mornings and had been so slow in taking action as to make it reasonable to resort to economic pressure. Similarly, the Board could find that the circumstances of the walk-out on the morning in question made the nature of the employees' demands self-evident. See App. B pp. 35-37, Sobeloff, C.J., dissenting.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to dis-

cans or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

The relevant provisions of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. 141, *et seq.*, are as follows:

Sec. 501. When used in this Act—

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

APPENDIX B

**United States Court of Appeals for the Fourth
Circuit**

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD**

(Argued January 11, 1961. Decided June 3, 1961.)

**Before SOBELLOFF, Chief Judge, and HAYNSWORTH
and BOHMAN, Circuit Judges.**

BOHMAN, Circuit Judge:

This case is here on petition of the National Labor Relations Board for enforcement of two orders against the Washington Aluminum Company directing it to reinstate certain discharged employees (126 NLRB No. 162) and to bargain in good faith with a union which was chosen as the collective bargaining representative only by counting the challenged ballots cast by the discharged workers in a representation election (128 NLRB No. 79). Upon a review of the whole record in this case, for the reasons hereinafter discussed, we conclude that enforcement of both orders should be denied.

The Washington Aluminum Company is engaged in the fabrication of aluminum products at a plant in

Baltimore, Maryland. As a part of its plant facilities, the company maintains a machine shop employing nine men, including a foreman and a shop leader. The machine shop is a rectangular structure with floor space measuring approximately forty by seventy-five feet. The shop contains two gas space heaters with a capacity of 85,000 B.T.U., one located in the aisle of the shop and the other at one end of the building. The opposite end of the shop is heated by an oil fired furnace with a capacity of 1,500,000 B.T.U. situated in an adjacent shop building designated as the "A" shop, which is equipped with ducts one of which carries heated air directly into the machine shop area. In November of 1958, an additional furnace with a capacity of 500,000 B.T.U. was installed in the "A" shop, and the two top rows of windows in the partition separating this shop from the machine shop were removed to allow additional heat from this new furnace to flow into the machine shop building.

Customarily on nights and weekends, these heating units are turned off when the plant is closed, not to be turned on again until 5:00 A.M. on the morning the work force is to return. However, on cold nights and weekends, the plant watchman, one Battaglia, who is charged with the responsibility of maintaining proper heating conditions in the plant during these times, is under standing orders to turn on all furnaces and heaters at such regular intervals as may be necessary to the maintenance of suitable temperatures throughout the plant.

On Monday, January 5, 1959, Battaglia turned on all the heaters and furnaces at approximately 1:00 A.M. and left them on for about one and one-half hours. At 5:00 A.M., he again started up the two gas space heaters in the machine shop and the smaller and newer of the furnaces in the "A" shop. He was

unable, however, after several attempts, to put in operation the larger furnace in the "A" shop. When the machine shop foreman, one Jarvis, arrived for work he found the larger furnace in the "A" shop not functioning and he and Battaglia informed the plant electrician, Rose, upon his arrival at work sometime between 7:00 and 7:15 A.M., that the furnace was for some reason mechanically inoperative. This particular furnace had ceased functioning temporarily several times since its installation although it had always been easily and quickly repaired. Rose discovered on this occasion that a control switch in the back of the furnace was in a certain position which, though it would permit the blower fans to function, would keep the electrodes from igniting the furnace fire. He immediately manipulated the control to its automatic position and the furnace shortly thereafter commenced to heat up in its normal manner. This mechanical adjustment had been made by approximately 7:30 A.M. and by the time the work whistle first sounded calling the employees to work.

The diminished heat output in the machine shop, due to the temporary functional failure of the large "A" shop furnace, was accentuated by the unusual weather conditions then prevailing in the Baltimore area. The temperature at 8:00 A.M. was but 15°, the high reading for the entire day was only 22° and the low reached 11° for an average reading of 17°, which was a minus 18° deviation from normal readings for the month. The low temperatures were additionally accentuated by the highest wind velocities recorded for the whole month.

Due to the extremely cold weather, the company president, one Rushton, had gone to the plant at ten o'clock on Sunday evening, January 4, to direct Battaglia to make certain that the plant's heaters and

furnaces were turned on frequently during the night so as to insure proper working conditions when the employees came to work the following morning.

When the machine shop employees did report for work Monday morning between the approximate times of 7:10 and 7:30, they found the machine shop to be noticeably and uncomfortably cold. The condition of the shop was variously described by the employees as "cold," "colder than other days," "colder than usual," "very cold," "real cold" and "extremely cold." When the first of the workmen to arrive, one Caron, the shop leader,¹ reached the machine shop he went directly to the foreman's office. During the course of an ensuing conversation, the cold condition of the shop was mentioned and foreman Jarvis remarked to Caron at some point after the other shop employees had arrived, that "if those fellows had any guts at all, they would go home." Although there was some question as to the import intended by Jarvis,² and as to

NOTE: So that the pertinent facts and circumstances may be fairly presented, we shall resort, at least in part, to copious footnotes.

¹ Caron's duties as "shop leader" were to assign the other workmen to the machines, to assist them and help plan their work schedules. He was not empowered to hire or fire, to grant permission for absence from work, or to allow a man time away from his work in the plant. These functions were vested wholly in machine shop foreman Jarvis and in higher management.

² Jarvis testified as to the tenor of the remark as follows:

"A. Well, we—I tried to be most frank with Mr. Caron on everything that we did. I tried to have here a man that if need be could replace me in the shop, or was fully aware of what was going on. We also worked together, as I said before; and, therefore, I was under the impression that things of this nature that we had said and had been said prior to this at various times, such as if we had a bad job, why, I think—I think on specific job, I remember, we had a landing gear we were working on. Something went wrong with it. And

the exact phrasing, there was no dispute that this statement, or one similar thereto, was in fact made. Shortly thereafter Caron went back to the machine shop work area and repeated Jarvis's remark in the presence of the other workers, none of whom had then started work. Caron thereupon told the other employees he was leaving and asked what they intended to do. He then left the machine shop alone but was closely followed by six of the other employees. Although there was an unwritten but well-known and long established company rule requiring that any employee leaving work first obtain permission from his foreman, and though the seven employees who walked out were admittedly familiar with this rule, none sought the permission of Jarvis before leaving.*

Immediately after his conversation with Caron and shortly before the subsequent walkout, Jarvis left the machine shop to go to the plant shipping department, returning only a "few minutes after the whistle had blown" or a little past 7:30 A.M. As he entered the shop, Jarvis saw several of the men heading toward the exit. Before he had reached the departing workmen, Jarvis passed by one Tafelmaier, another machine shop employee, and requested that Tafelmaier stay at his machine, which he did. Jarvis testified that during the time of his brief remarks to Tafel-

remarks were made to the sense that 'grab your tool box and let's go, this job is all fouled up.' Something of that nature. This was more or less our relationship. I don't know how I can dress that up any more, or make it any clearer."

*Jarvis testified that although he had authority to grant single employees time off for part of a day, by general understanding permission for any employee to be absent from work for a period of several days, or for more than one employee to leave at the same time, except in cases of illness, would have to be granted by Wampler, the general plant foreman, or by Tarrant, the plant manager.

maier the seven other men had gone out of the shop and, consequently, he had no opportunity to inquire as to their reasons for leaving or to request them also to remain.⁴

The immediate result of the walkout was to leave only Tafelmaier and Jarvis himself in the machine shop. In order to complete what general plant foreman Wampler termed "critical" jobs that were at the time being processed in the machine shop, Wampler supplied Jarvis with two temporary workers who had to be taken from their normal assignments in other departments of the plant. At approximately 8:20 A.M., company president Rushton arrived at the plant and, noticing these men and the absence of the seven regular workmen as he passed through the

⁴ Although Jarvis testified that he heard one of the departing employees yell "[r] 'e are going home," he firmly denied having participated in any conversation with any employees other than Tafelmaier at the time of the walkout. Employee Caron, however, testified that as he was leaving he passed Jarvis and "might" have said, "I will see you tomorrow. I am going home," receiving the reply, "Okay, Babe, I will see you tomorrow." Employee Heinlein testified that as he departed he had asked Jarvis, "Aren't you going with us," to which Jarvis answered, "You know I can't do that." Another employee, Adams, when asked if he had said anything to Jarvis before leaving, said "I told him I am cold; Dave, I am sick, and I am going home."

The General Counsel affirmed at the hearing before the Trial Examiner that the Board would not contend that the employees participating in the walkout had obtained permission therefor from any source as was required by company rule.

Moreover, accepting the above remarks as having in fact been made, it should be noted that only the third referred in any manner to the heating condition in the machine shop. None of them embodied a query as to the cause or probable duration of the cold, none alluded to the cold as the specific cause of the walkout and not one contained any form of a request that the condition be either investigated or alleviated.

machine shop, asked Jarvis what had occurred. When he was told the men had walked out before starting work, he said to Jarvis, "We are going to terminate them." Rushton then called Jarvis and plant manager Tarrant to an office, discussed the situation with them and told them of the final decision to discharge all of those who had walked out. Four of the men, Adams, George, Hovis and Olshinsky, were sent telegraphic notices of dismissal by the company personnel officer. When employee Affayroux returned to the machine shop at 9:00 o'clock that same morning from a nearby restaurant where he had gone for a cup of coffee, Jarvis personally informed him of his discharge. The remaining employees, Heinlein and Caron, were then contacted and notified by telephone.

Although there was some question as to the actual time at which a final and effective decision to terminate the men had been reached,^{*} they were undeniably discharged within a short time after the walkout and before replacements had been hired. Although there was further dispute as to the company's real motiva-

^{*} Foreman Jarvis testified that when company president Rushton first arrived in the machine shop at approximately 8:30 A.M. and had noticed the absence of the regular workmen, he had said, "these people left the premises unauthorized, and I want them discharged." Jarvis further testified that he and Wampler then held a meeting with Rushton to discuss the discharges before the men were notified of their terminations. Wampler testified the decision to discharge was made between "9 and 9:30" by himself, Jarvis and Rushton. Rushton testified that when he noticed the absent men in the machine-shop he stated to Jarvis, "Dave if they have all gone, we are going to terminate them," but had added, "[w]ell, before you do that now, I want a list of these people, whoever they are." Rushton further stated he first discovered the men had left without their foreman's permission at the meeting with Jarvis and Wampler and that the final decision to discharge was reached about 9:00 A.M., just before he left the plant.

tion for the discharges,* the Trial Examiner concluded that the employees participating in the walkout had been engaged in a "concerted refusal in the course of their employment to perform any services for Respondent [the company] in protest of certain working conditions, to wit, the failure of Respondent to supply adequate heat in their place of employment." Since the men were thus determined to have been "economic strikers," the Trial Examiner then held the discharges made before replacements were hired unlawful under section 8(a)(1) of the act, and that the employees therefore retained their employee status and were entitled to reinstatement with back pay.

"The Trial Examiner briefly found that Rushton's testimony that "the real reason [was] because they didn't inform the foreman of the action they were taking," was "merely the statement of an afterthought." The above quoted statement of Rushton's was elicited during the following colloquy with the Trial Examiner:

"The WITNESS [Rushton]. Well, the real reason of course is that I was very upset at the foreman for not getting the information from those fellows, not getting the—

"TRIAL EXAMINER. Is that the reason you discharged the men, because the foreman didn't get the information?

"The WITNESS. The real reason is because they didn't inform the foreman of the action they were taking.

"TRIAL EXAMINER. Is that the reason you discharged them?

"The WITNESS. That, *plus* the disciplinary action." [Emphasis supplied.]

Jarvis testified that Rushton had stated he would discharge the men because "they had left the premises unauthorized. And this curtailed our operation. And this they were discharged for." Wampler, the general foreman, who also participated in the discharge discussions, further testified as follows:

"Q. Why did you fire these men?

"A. For violating plant rules, leaving the plant without permission, and to maintain discipline.

"TRIAL EXAMINER. Wait a minute. Violating plant rules and leaving the plant without permission is the same thing, isn't it?

"The WITNESS. Well they left without the foreman's permission.

The Board affirmed the Trial Examiner's report, modifying it only by adding particular emphasis to the testimony of employee Hovis to the effect that "[w]e all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way;" the testimony of three of the discharged employees as to prior complaints about cold conditions in the machine shop; and the circumstance of the men leaving in a body, all at about the same time. There was one element in the intermediate report, however, not touched upon or developed by the Board in its opinion, which we believe points up the crucial factor precluding enforcement of the Board's orders in this proceeding.

In the text of his report, the Trial Examiner alluded only briefly to the presentation or specification of a demand or grievance by the employees by noting

"TRIAL EXAMINER. All right. They left without permission. And they violated the plant rule when they left without permission, didn't they? It is the same thing, isn't it?

"THE WITNESS. Yes, I would say so.

"TRIAL EXAMINER. And to maintain discipline, you didn't fire them for that?

"THE WITNESS. No, not for that reason.

"TRIAL EXAMINER. Then you fired them because they left the plant?

"THE WITNESS. Correct.

"TRIAL EXAMINER. Without permission?

"THE WITNESS. Correct."

Beyond concluding that one of Rushton's several statements was an "afterthought," the Trial Examiner held only that "by their [the employees] concerted activity * * * [they] were economic strikers * * * that by reason of their being discharged *before they were replaced*, they continued to so remain and were therefore unlawfully discharged employees * * *." The Trial Examiner made no further findings as to the company's reasons for the discharge and the Board's decision is silent on the point.

"the fact that they [the employees] were discharged before they had an opportunity to formally elect a committee to deal with the Respondent [the company] with respect to the adjustment of their grievance (as argued by the Respondent) is of no moment." While we do not intimate that it should ever be thought that employees not represented by a union are required to effect some sort of formal organization of a grievance committee of their fellows to submit their claims to management prior to a concerted protest of employer practices thought to be unfair, the record here before us manifests a conspicuous and total absence of any action on the part of the employees to attempt to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company prior to the walkout.

There is little question that working conditions in the company's machine shop were less than comfortable on the morning of the walkout. The employees all testified that the shop on this morning was "cold" if not "extremely cold"; employee George testified that when he arrived at work that day he found a small icicle on one of the pipes of the water cooling system of a welding machine; employee Tafelmaier, the one worker not joining in the walkout, worked that morning until about 10:30 wearing his overcoat; foreman Jarvis testified that the shop was "a bit uncomfortable" until around 10:00 A.M. and that it was not until lunch time or shortly thereafter that the men then working in the shop removed extra coats or sweaters they had worn during the morning. In addition, Caron testified that shortly before the walkout he had observed his fellow workers "huddled" together and "shivering" in the cold.

It is apparently undisputed that the coldness was in great part attributable to inclement weather on one

of the coldest days experienced during the winter of 1958-59, and that the abnormal freezing temperatures were intensified by the most severe winds of the entire month. Moreover, it is clear the company was fully aware of its responsibilities to combat these conditions for, although the plant watchman was under standing instructions as stated, the company president himself visited the plant the evening before the walkout to insure that adequate heat would be provided the employees the following morning. While the watchman was unable to fully carry out these orders, this was undeniably due to the unexpected mechanical failure of one of the plant furnaces, a condition beyond the control of the company and one quickly and effectively remedied. The plant electrician attended to the matter immediately after his arrival at work, the furnace was operative by the time the men were to have started work at 7:30 A.M., it was heating to its full capacity within five to eight minutes thereafter, within twenty minutes heat from its directional ducts was being forced forty or fifty feet into the machine shop, and before lunch time this area had been heated to normal working temperature.

There was some variation in the testimony of the employees as to the real reason for the walkout.¹ But

¹ Caron testified that just prior to leaving he turned to his fellow workers and said, "[w]ell, Dave told me if we had any guts, we would go home," and "I am going home, it is too damned cold to work"; Heinlein testified that upon hearing this statement of Jarvis's he answered by stating, "[i]t is all right with me, I am going home too"; George and Olshinsky also stated they left in part because of Caron's repetition of Jarvis's remark and, additionally, because of the cold; Adams also stated he left because of the remark and, although he had not sought permission to leave, for the further reason that he had been running a fever which subsequently led him to obtain a doctor's certificate of illness; Affayroux walked out because

even if it be assumed their sole purpose was to protest the low temperature of their place of employment, we do not believe their actions should be considered a protected activity under the facts and circumstances here presented. One of the fundamental policies of the National Labor Relations Act, 29 U.S.C. § 151 (1958), is to secure industrial peace and prevent strife and disruption by encouraging negotiation and peaceful procedure for the attempted settlement of the demands of a party. That is not to say that employees may not, under any circumstances, exert concerted pressure on their employer in their efforts to gain compliance with their demands. However, the office of a demand as a condition upon the use of concerted pressures is well recognized. As this court stated in *Jeffery-De Witt Insulator Co. v. NLRB*, 91 F. 2d 134, 138 (4th Cir. 1937):

“ . . . ‘A strike,’ in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused.”

An important and necessary qualification of the right to exert pressure on an employer through work

of the cold and because he wanted to “stick” with the others; and Horis because he had thought that “maybe we could get some heat brought into the plant that way.”

* This general principle is discussed in RESTATEMENT, TORTS § 707, comment a (1939), as follows:

“A strike is a concerted refusal by employees to do any work for their employer . . . until the employer grants the concession demanded. . . . [I]t is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will.” [Emphasis supplied.]

stoppages is that such pressure be exerted in support of a demand or request made to the employer.

In the instant case, none of the concerned employees made any statement before, during or subsequent to the walkout which alluded in any way to a demand that measures be taken to investigate or alleviate the cold in the machine shop.* Each of the

* Attempting to develop the theory of a long standing labor dispute, the Board cited testimony of the employees consisting of the following responses to questions as to whether they had ever complained of their working conditions: Heinlein answered, "I have frequently on occasion remarked to Mr. Rushton as he went through the building, and also to Mr. Esender [a former production manager but production co-ordinator at the time of the walkout], and I think Bill Campbell [also a former production manager employed in the estimating department when the walkout occurred]." When asked when he had so complained, Heinlein answered, "It may have been two or three times during the six months before that. Maybe a year before that. Maybe two years"; George said he had complained to "Mr. Esender and Mr. Jarvis," but amplified this by explaining that he had simply asked "why the large furnace wouldn't put out more heat"; and Caron testified, "I used to talk to Dave [Jarvis] that it was cold and miserable" but he could not recall any specific occasion when he had in fact so complained.

Conversely, foreman Jarvis testified "the complaints were in the line of general griping that you have in the lot. It is either too cold or too hot or something of that sort," and stated that he had never received a specific request for management action. Tarrant and Wampler both testified they had never heard specific complaints about the cold or received requests concerning such conditions in the shop but had only heard "conversation" about weather conditions in general. The only other member of management testifying on the point, president Rushton, described the employees' comments as "gripes" such as "It is cold today." No more than we have talked about the heat last week, it has been pretty unbearable."

Accepting the prior "complaints" or "gripes" at full face value, it is notable that not one, with the exception of George's query "why the large furnace wouldn't put out more heat," was

employees admitted he had made no attempt to ascertain the cause of the condition, and all testified they were unaware of the temporary failure of the larger "A" shop oil furnace and did not know it had been effectively repaired by the time they were to have started work. Had they made some effort to request improvement of the condition in the machine shop prior to abandoning work, it is evident from the record their efforts would have been rewarded. While the shop was undeniably cold at the time the men left, conditions in the shop gradually improved, as a result of the furnace repair, to the point where those then in the shop were working in normal comfort. Not only had the company, on its own initiative, done all that it could to relieve the cold before the walkout, there is nothing in the record to indicate that a requested adjustment of the problem could not otherwise have been effected. Indeed, the refusal of the employees to seek explanation of the cause of the condition and a correction is heightened by the unquestioned privilege they all possessed, that is, to simply request the plant maintenance man to turn up the thermostats on any or all of the various heaters and furnaces the men knew to be functioning at the time of their walkout.

In none of the cases cited by the Board in this proceeding was there the total absence of a demand by the protesting employees as is here apparent." In

of the nature of a demand or request of the company. Moreover, as will be developed, had a question similar to George's prior inquiry been made on the day of but before the walkout, the lack of necessity for such a disruptive protest would have been readily apparent.

"In *NLRB v. Knight Moley Corp.*, 251 F. 2d 733 (6th Cir. 1957), the employees had complained of excessive heat through their union steward and the union president to both their foreman and management and, before walking out, they again

the instant case, without any sort of demand on the company, the involved employees summarily left their place of employment. Under such circumstances, it

sought permission to leave work through their union steward and president; in *NLRB v. Solo Cup Co.*, 297 F. 2d 821 (8th Cir. 1966), the employees shut down their machines and immediately demanded discussion with the plant manager concerning the discharge of a fellow worker and, when informed he would soon talk with them, they resumed their work; in *NLRB v. Cowles Pub. Co.*, 214 F. 2d 708, 710 (8th Cir. 1954), the court found "there is no dispute that the strike was in support of specified demands for a raise in pay and for improved working conditions, submitted to the employer prior to striking"; in *NLRB v. Southern Bell Mfg. Inc.*, 239 F. 2d 185 (6th Cir. 1953), *aff'd on rehearing*, 210 F. 2d 824, 825 (1954), the court found that "[m]anagement was advised of the reason for the stoppage and gave no satisfactory response"; in *Modern Motors, Inc. v. NLRB*, 198 F. 2d 925 (8th Cir. 1956), prior to quitting work over a disputed bonus payment, the employees discussed their grievance directly in a meeting with the company president; in *Owens v. NLRB*, 190 F. 2d 888 (3rd Cir. 1951), before leaving work to protest the discharge of a fellow worker, the employees had negotiated for a consent election and had taken an open strike vote, the very knowledge of which had prompted the employer's president to address them in a body at the plant; in *NLRB v. Kennametal, Inc.*, 188 F. 2d 817 (3rd Cir. 1950), the employees stopped work and went directly to the company cafeteria where they discussed a demanded wage increase with their company president; in *Gullett Gin Co. v. NLRB*, 179 F. 2d 499 (5th Cir. 1950), the employees were discharged in the very midst of a meeting with management discussing a proposal for increased wages; in *Horn Beneficial Life Ins. Co. v. NLRB*, 159 F. 2d 290 (4th Cir. 1947), the employees' union had extensively negotiated working hour arrangements and the concerted activities were commenced only after the employer had refused to accede to the union demands and after the union had given notice of the pending concerted actions; and in *Firth Carpet Co. v. NLRB*, 129 F. 2d 633 (2d Cir. 1942), the employees left work only after they had negotiated for certain guaranteed overtime pay with the shop chairman and their foreman, and after management had refused the requested guaranty.

would be to disregard the obligation to present a demand for peaceful settlement, and contrary to the fundamental purposes of collective bargaining, to hold the employees' unilateral action a protected concerted activity. Where certain employees had refused to enter their place of employment without first making known the reason for such refusal or requesting any concession of their employer, in *NLRB v. Ford Radio & Mico Corp.*, 258 F. 2d 457, 465 (2nd Cir. 1958), the court said:

The duty to bargain collectively is but a facet of the underlying purpose of the entire Act in promoting and encouraging the peaceful settlement of labor disputes. Placing the activity here under the broad protection of section 7 would clearly frustrate that purpose. To hold that those engaging in a strike had an unfettered right to refuse not only to discuss their grievances but even to name them would, far from promoting the peaceful settlement of labor disputes, inject a judicially fashioned element of chaos into the field of labor relations. "The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. . . ."

We do not hold as a matter of law that employees engaging in concerted activities must give formal or even informal notice of their purpose. However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they choose to remain silent, bear the risk of being discharged.

We believe this principle particularly applicable where, as here, the cause of the objectionable condition was largely fortuitous and substantially beyond

the control of the employer and was of but brief duration, and where, even beyond the neglected opportunity for inquiry, negotiation and settlement, effective measures had been taken by the employer before the protest was even staged. The company was afforded no opportunity to avoid the work stoppage by granting a concession to a demand of the employees.

The National Labor Relations Act has for one of its objectives the protection of employees in freely negotiating concerning unsatisfactory plant conditions and other conditions of employment without fear of reprisal, but the purpose of the act was not to guarantee to the employees the right to do as they please under any given set of circumstances and in total disregard of the obligations of their employment. In the instant case, regular production schedules involving "critical" purchase orders were disrupted; to do the work of those who absented themselves, employees were transferred from their regular jobs in other departments and there is no evidence that any of those so substituting suffered any ill effects other than temporary discomfort. With no reasonable justification, the employees left their jobs without first having obtained the necessary permission. In a situation where several employees, unprotected against the elements, left work early with the permission of the foreman and were later discharged by higher management on the basis of the foreman's report that they had left without permission, the Board held that since the basis for the discharges was a good faith belief that permission to leave had not been obtained, the discharges could not be said to have been discriminatory or an unfair labor practice in violation of the act. *Scott Lumber Co.*, 109 N.L.R.B. 1373 (1954). In the instant case, the company is not to be held guilty of an unfair labor practice for having discharged employees

who had in fact left their jobs without permission in violation of a well known company rule. Under these circumstances, we conclude that the discharges were not, in any sense, discriminatory and were not without justification; also, by reason of their failure to present a grievance to the company, the employees were not engaging in a protected activity since they were not acting in concert for their mutual aid or protection in withholding their services.

The final issue presented is the Board's finding that the company had refused to bargain in good faith with a union elected by the determinative counting of challenged ballots cast by four of the employees previously discharged for having participated in the January 5, 1959, walkout in violation of sections 8(a) (1) and 8(a)(5) of the act." Having previously con-

"The first tally made of the March 17, 1959, consent election resulted in 68 votes in favor of the proposed union, the Industrial Union of Marine & Shipbuilding Workers of America, and 70 votes against such union with five votes challenged and one held void by the Board agent. Four of the challenged ballots were those cast by employees discharged for participating in the January 5, 1959, walkout, Affayroux, Heinlein, Hovis and Olshinsky. The Board's Regional Director later recommended the allegedly void ballot be counted as a "Yes" vote in favor of the union. The revised tally then stood at 69 votes in favor of and 70 votes opposed to the union. The Regional Director also recommended that the ballot of one Dicus, who was initially challenged as being a supervisor under the terms of the act, be counted. With the addition of the Dicus ballot, the result would then have been either 69 to 71 against union representation or would have been a tie vote. In either case, the union would not have received a majority of the ballots cast and the Board acknowledges the result of the election depends on the validity of the four ballots cast by the above walkouts. The Regional Director recommended that these challenges be determined together with the unfair labor practice charges pending in respect to the voters' discharges. When the Board on March 31, 1960, held that the discharges had in fact been

cluded the men casting these determinative ballots were properly discharged for cause on January 5, 1959, prior to the eligibility period for the representation election, the week ending February 2, 1959, it necessarily follows that the union's status as the certified representative of the employees, dependent as it is upon the validity of these ballots, must fail. Since the union has thus failed to carry the representation election, the Board's order directing the company to bargain in good faith with that union will be denied enforcement, and the Board's certification of that union will be vacated and set aside. *Ohio Power Co. v. NLRB*, 176 F. 2d 385, 388 (6th Cir. 1949).

Enforcement denied.

SOBELOFF, Chief Judge, dissenting:

The Labor Board's position is neither unsupported by the record nor unreasonable, and I find no warrant for refusing enforcement of its order. The evidence at the hearing clearly furnishes a foundation for the Board's conclusion that the walkout of the seven employees constituted concerted activity protesting the unsatisfactory working conditions in the machine shop. Whatever notice or demand upon the employer might be required in other circumstances need not be decided, for no additional notice or demand was neces-

unfair and that the voters had thus retained the status of employees through the time of the election, all challenged ballots were tabulated resulting in a final count of 73 votes in favor of the union with 71 opposed. The union was certified on April 13, 1960, and on April 21 the company, by letter to the union, stated that "pending the outcome" of the instant proceeding, it was "not in a position to sit down with the Union and negotiate a contract." On August 16, 1960, the Board held the company's letter constituted an admission of a refusal to bargain in good faith, and further affirmed its prior decision that employees participating in the walkout had been unfairly discharged.

sary under the well supported findings of this case.

The employer's contention that the activities of these men did not amount to concerted activity is refuted by the findings of the Examiner and the Board, based upon testimony of the employees. The Board states:

The Trial Examiner found, and we agree, that the Respondent violated Section 8(a)(1) in terminating the employment of the 7 complainants who were engaged in protected concerted activity under the Act. We rely, *inter alia*, upon the following: the credited testimony of employee Hovis that "We all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way"; the credited testimony of employees Heinlein, Caron and George as to previous complaints made to the Respondent's foreman over the cold working conditions, and to the effect that the men left on the morning of January 5 in protest of the coldness at the plant; and the evidence that the 7 complainants left the shop at approximately the same time.

My brethren apparently agree that if there had been a notice or demand, the walkout would be concerted activity protected by the Act. However, the court denies enforcement because, it is said, "An important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer." There was, however, such notice to the employer in the instant case." On a

¹² That notice of the reasons for concerted activity need not follow any prescribed form is clearly shown by the second of the two paragraphs quoted in the court's opinion from *N.L.R.B. v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 465 (2nd Cir., 1958). There, unlike the present case, management did not precipitously fire employees. It took action only after futile

number of earlier occasions complaints had been made about the lack of heat in the shop. On the morning of the walkout, employee Caron discussed the coldness with the foreman, Jarvis. Also, as the men were walking out, they told Jarvis that it was too cold to remain and work.

Furthermore, the employer, through its foreman, indicated that the men should go home. Jarvis told Caron: "If those fellows had any guts at all, they would go home." When Caron reported back to the men, he told them that the foreman had suggested that they leave. Under these circumstances it is plainly improper to upset the Board's decision.

attempts to learn the cause of the employees' grievance. In the instant case, by no stretch of the facts was management "placed in the position of having to guess at its peril the purpose behind the strike," *id.*, page 464.

United States Court of Appeals for the Fourth Circuit

No. 8211

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY, INC., RESPONDENT

**ON PETITION FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD**

Decree Filed and Entered June 3, 1961

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of certain orders issued by it against the Washington Aluminum Company, Inc., its officers, agents, successors, and assigns, on the 31st day of March, 1960, and the 16th day of August, 1960, in proceedings before the said Board known upon the records of the Board as Cases Nos. 5-CA-1496 and 5-CA-1696, respectively; upon the answer of the respondent; and upon the transcript of the record in said proceedings, certified and filed in this court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition for enforcement be, and it is hereby, denied, and that the Board's certification of the union be vacated and

set aside, in accordance with the opinion of the Court filed herein.

CLEMENT F. HAYNSWORTH, Jr.,
United States Circuit Judge.

HERBERT S. BOREMAN,
United States Circuit Judge.

I dissent:

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

Filed June 3, 1961.

R. M. F. Williams, Jr., Clerk.

[Clerk's certificate omitted]

OCT 28 1961

IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 464

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

WASHINGTON ALUMINUM COMPANY, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
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No. 464

NATIONAL LABOR RELATIONS BOARD,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fourth
Circuit (App. B of Petition) is reported at 291 F. 2d 869.

JURISDICTION

The jurisdictional requisites are adequately set forth in
the Petition.

QUESTIONS PRESENTED

1. Whether the group activity in this case was concerted
activity for the purpose of mutual aid or protection with-

in the meaning of Section 7 of the National Labor Relations Act.

2. Whether an employer may discharge "for cause", within the meaning of Section 10(c) of the National Labor Relations Act, employees who suddenly stage a walkout without giving notice or making protest or demand (in the complete absence of a pending grievance or current labor dispute) under circumstances which deny the employer an opportunity to avoid the walkout by negotiation or concession.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act not set forth in the Petition are set forth in Appendix A, *infra*, pp. 19-21.

STATEMENT

The Cold Conditions On January 5 Were Fortuitous, Momentary and Completely Unrelated to Pre-existing Working Conditions.

There is no question that at the time of the walkout here involved, working conditions in the plant were less than comfortable by reason of a cold wave, combined with and accentuated by the watchman's inability to start the main furnace which heated the plant. However, these conditions were far from normal, completely fortuitous, and were corrected by Respondent on its own initiative as soon as humanly possible.

The morning of January 5 was one of the coldest experienced during the winter of 1958-59 (R. 49). The temperature at 8:00 A.M. was 15°. The average temperature for the entire day was only 17°, representing minus 18° devia-

tion from normal (R. 90). The freezing temperatures were accompanied by northwest winds averaging 24.4 m.p.h. with gusts up to 43 m.p.h. (R. 90), the highest wind velocities recorded for the entire month (App. B of Petition, p. 19). Six of the seven men honestly admitted that the plant was much colder than on other Monday mornings of that winter (R. 34, 37, 39, 40, 42, 44). Respondent's witnesses also made it unequivocally clear that the cold condition in question did not represent normal working conditions. Tafelmaier, the eighth machinist (the only one who did not join the walkout), wore his overcoat at his machine from 7:30 until 10:30 A.M., at which time normal working temperatures were restored. This was the only morning of the entire winter that he did so (R. 47-49).

As pointed out by the Court of Appeals (App. B of Petition, p. 27), Respondent was fully aware of its responsibility to combat these cold conditions. The night watchman had standing instructions to turn on all furnaces and heaters at such regular intervals as may be necessary to maintain suitable temperatures throughout the plant on cold nights and weekends (R. 50, 64). And on the Sunday evening before the walkout, the company president himself had visited the plant to insure that adequate heat would be provided the employees the following morning (R. 69).

On the morning in question, the watchman, pursuant to orders, had actually turned on the space heaters and a 500,000 B.T.U. furnace at 1:00 A.M. (for one and one-half hours) and again at 5:00 A.M.; ironically however, he was unable to start the 1,500,000 B.T.U. main furnace at either time (R. 50). He notified the company electrician of the difficulty at or about 7:15 A.M., as soon as the electrician arrived at the plant. The electrician immediately diagnosed the trouble as a simple matter of manipulating a

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control switch at the rear of the furnace, and the furnace was put into operation within a minute or two after the starting bell rang at 7:30 A.M. (R. 66-67). By 7:45 A.M., the main furnace was burning at full capacity. By 10:00 or 11:00 A.M., the plant was warm (R. 48, 59, 67, 68). By lunchtime, the plant was heated to normal working temperatures and the men were able to take off their denim shop-coats and work in shirt sleeves (R. 59; Tr. 156).

The seven machinists, however, had long since left the plant. Without even giving notice, much less informing their employer "of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them", the men staged the walkout within less than twelve minutes after the starting whistle sounded (R. 55; Resp. Ex. 2). If, instead of staging the precipitous, unilateral walkout, the employees had attempted to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company (if indeed they had any) prior to the walkout, it would most certainly have followed that the walkout and all the consequent labor strife which followed would have been avoided (App. B of Petition; p. 30).

*There Was No Pending Grievance or Current
Labor Dispute Over Cold Conditions.*

The Petition fails to mention the employer's efforts to provide warmer working conditions made in November, 1958 (only two months prior to the January 5 walkout) when employer installed an additional 500,000 B.T.U. furnace in A shop (R. 68), the heat from which flowed into the machine shop (App. B of Petition, p. 18). This evidence destroys whatever vague value the Heinlein testimony had to support the Board's finding that previous com-

plaints had been made about cold conditions.¹ The testimony of George² and Caron³ was similarly vague and un-specific. The most that the testimony of these men proves is that three men, individually, may have griped about the cold to their foreman on some vague occasion or another. Four of the seven machinists did not even testify as to any previous complaints. The foreman and higher management were totally unaware of any specific request that action be taken or of any demand that more heat be brought into the plant, and were unanimous in their testimony that the general gripes about the cold were the same sort of gripes as the gripes made about the heat in the summertime (R. 52-53, 62, 63, 68). The record in this case is devoid of any evidence whatsoever of a pending grievance about cold working conditions or of a pending demand or request, general or specific, made by the men, individually or in concert, that more heat be supplied to the machine shop area. To dignify the testimony above mentioned as evidence of a current labor dispute within the meaning of section 2(9) of the Act is patently absurd.

¹ Heinlein testified he frequently "remarked" to certain persons about the cold; but he could remember no specific date or time (R. 32). When cross-examined as to specific days he spoke to Rushton, Heinlein said "Well, I couldn't say what day. It may have been two or three times during the six months before that. Maybe a year before that. Maybe two years" (R. 34).

² "Q. Can you recall any specific time that you complained to Mr. Jarvis? A. On several of the cold mornings I asked Mr. Jarvis [the foreman] why the large furnace wouldn't put out more heat" (R. 36).

³ "Q. Did you ever make any complaints to anybody concerning that? A. I used to talk to Dave [the foreman] that it was cold and miserable.

* * * * *

"Q. (Trial Examiner) On what day was this, now? A. (The Witness) Not any special day. On cold days."

Caron went on to testify that he never complained to any other company official and that the only specific day he could think of that he complained to the foreman was, he "thought" as to a cold spell two weeks prior to January 5 (R. 25-26). This testimony was not corroborated by any of the other men.

***The Walkout Did Not Represent A Protest But Was Rather
a Temporizing Response to the Foreman's
Statement Made to Caron.***

The basic reason for the walkout testified to by all seven men was that it was in response to the invitation or dare contained in the jocular or facetious statement⁴ of Jarvis (the foreman) made to Caron (the leader) and relayed by Caron to the men, to the effect that if they had any guts they would go home (R. 27, 30, 33, 37-38, 39-40, 43, 45). Jarvis was not present when the men decided to walk out, having gone to the shipping department with a finished part (R. 55; App. B of Petition, pp. 21-22). He returned to the machine shop a few minutes after 7:30 A.M. just in time to observe the men some distance away walking out the door (R. 55). His immediate reaction was that the men "were kidding" (R. 55), that it was "a put-up joke" (R. 61). He was "flabbergasted" (R. 60). By the time he was able to persuade Tafelmaier, who had lagged behind, not to leave, the other men had left the plant (R. 55-56). If Caron had not reported the Jarvis statement to the men, it is plain that the men would never have walked out of the plant that morning simply because it was cold. The operations of a fabricating plant do not and cannot stop in cold weather. It was frequently necessary from the nature of the business to open large doors to the outside to bring in raw materials and to take out finished products (R. 52).

Completely apart from these proceedings, three of the men, Affayroux, Hovis and Olshinsky, previously testified before the Maryland Department of Employment Security concerning their reasons for walking out. This testimony substantiates the conclusion that the men walked out be-

⁴ Jarvis frequently jested with Caron (App. B to Petition, p. 20, fn. 2).

cause of Jarvis' statement to Caron and negates any possibility that the walkout was meant to constitute a protest. Thus, Affayroux admitted that he had testified "The leader of the machine shop stated that the foreman had said that it was too cold to work and we would be fools if we did not go home" and "*as a result of this statement by the leader [I] left the job along with the other men*" (R. 43, 44). Olshinsky admitted he had testified that "It was customary to take orders from the leader, and [I] was of the opinion that the leader had the authority to permit [us] to go home" (R. 42). Hovis admitted he had testified that the leader of the machine shop had told him that it was too cold to work and that the men were going home, that he had never questioned Caron's authority before and that he *assumed* that the leader was speaking for the foreman (R. 46).⁵

Moreover, the men did not walk out to enforce a demand, refusing to return unless the employer granted some concession. They all intended to return to work the next morning. In fact, George did return to work Tuesday morning, January 6,⁶ not knowing he had been discharged (R. 36). Caron testified that as he was leaving, he said to Jarvis, "I will see you tomorrow, I am going home", receiving the reply, "Okay, Babe, I will see you tomorrow"

⁵ The Trial Examiner and the Board (R. 1, 13) place emphasis upon the so-called "credited" testimony of Hovis to the effect that the men all got together and "thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way" (R. 45). This self-serving testimony was completely discredited by and inconsistent with the above mentioned testimony given by Hovis before the Maryland Department of Employment Security on February 24, 1959 (R. 45-46). Parenthetically, it should be noted that if the men walked out under the mistaken impression that they had the foreman's permission, the walkout would not have been for the purpose of "mutual aid or protection". *Scott Lumber Co., Inc.*, 109 N.L.R.B. 1373, 1375 (1954).

⁶ January 6 was almost as cold and almost as windy as January 5 (see G. C. Ex. 2).

(App. B of Petition, p. 22, fn. 4). Heinlein testified that "certainly" he was going to return to work the next day (R. 35). Affayroux did not even go home. He went to a nearby diner for some coffee and returned to the plant later that morning (R. 44). Adams went home because he was sick and later obtained a doctor's certificate to substantiate the fact (R. 39).

Summary

As pointed out by the Court of Appeals (App. B to Petition, p. 26), " * * * the record here before us manifests a conspicuous and total absence of any action on the part of the employees to attempt to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company prior to the walkout." The record also shows that while the men walked out because it was cold, the walkout was neither a strike nor a work stoppage in protest of working conditions. It was precipitated by a statement of a foreman which was intended as facetious. It was engaged in by all completely without reference to a current labor dispute or a pending demand or grievance and without expressed purpose or stated objective. Management was neither consulted nor informed as to the intended action or the purpose of the walkout and had no opportunity whatsoever by negotiation or concession to avoid the walkout and thus maintain its important machine shop operation. Under the circumstances, the company refused to condone the unilateral precipitous action at the price of abandoning necessary plant discipline, and decided to discharge the men. It is not disputed that the only motivation or reason in discharging the men was to punish them for violating plant rules in leaving their jobs without permission and without informing their foreman of their intentions (App. B. of Petition, pp. 24-25, fn. 6).

ARGUMENT

I.

THE DECISION BELOW WAS CLEARLY CORRECT

The Court of Appeals correctly held that the walkout was not protected concerted activity within the meaning of section 7. "Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." The unannounced walkout engaged in here without informing the employer "of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them", was repugnant to the basic and underlying policy of the Act, as expressed by Congress,⁷ the courts,⁸ and the National Labor Relations Board,¹⁰ viz., to eliminate industrial strife and unrest "by encouraging the practice and procedure of collective bargaining", to protect the freedom of workers to associate and organize "for the purpose of negotiating the terms and conditions of their employment or other

⁷ *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42, (1937).

⁸ Section 1 of the National Labor Relations Act, as amended, (29 U.S.C. 151); Sections 1(b) and 201(a) of the Labor Management Relations Act (29 U.S.C. 141(b) and 171(a)). (See App. A *infra*).

⁹ *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 249, 264-65 (1949); *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 465 (2nd Cir. 1958). See, *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 483, fn. 6, 492-93, fn. 22, 23 (1960); *Textile Workers Union of America v. National Labor Relations Board*, 227 F. 2d 409, 410 (D.C. Cir. 1955), *cert. vacated*, 352 U.S. 864.

¹⁰ *Textile Workers Union of America, C.I.O. (Personal Products Corporation)*, 108 N.L.R.B. 743, 746-47 (1954); *Pacific Telephone and Telegraph Co.*, 107 N.L.R.B. 1547, 1549-50 (1954).

mutual aid or protection", and to secure sound and stable industrial peace "by the settlement of issues between employers and employees through the processes of conference and collective bargaining."

Under such circumstances, the right of the Respondent to discipline such action by discharge for cause under section 10(c) "whether or not the acts constituting the cause were committed in connection with a concerted activity" has been clearly expressed by Congress¹¹ and this Court.¹²

The policy of the Act, then, discourages precipitous unilateral action and presupposes that mutual discussion and bargaining over some demand or grievance shall precede resort to economic pressure. The duty of employees to present their demands to their employer and to advise what concessions can be made to avoid a walkout "is but a facet of the underlying purpose of the entire Act in promoting and encouraging the peaceful settlement of labor disputes". To place the walkout here under the broad protection of section 7 would clearly frustrate that policy and instead of promoting the peaceful settlement of labor disputes would "inject a judicially fashioned element of chaos into the field of labor relations". *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 465 (2nd Cir. 1958).

In addition to being irreconcilable with the basic policy of the Act, the walkout here is not protected by section 7 for a number of other reasons.

1. It is true that section 8(a)(1) protects the right of employees under section 7 "to engage in concerted activities for the purpose of collective bargaining or other mutual

¹¹ H. R. Rep. No. 510, 80th Cong., 1st Sess., pp. 38-39.

¹² *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464, 473-74, 477-78 (1953).

aid or protection." But section 8(d) (App. A of Petition, p. 14) points out that collective bargaining is the performance of the *mutual* obligation of the employer and the employees to *meet and confer* with respect to terms and conditions of employment. Accordingly, the walkout was not for the purpose of collective bargaining under section 7. Nor was it a protest of working conditions for the purpose of "other mutual aid or protection" under section 7. The evidence shows that the men left the plant *because* it was cold, not in protest of the cold, fully intending to return the next morning, in precipitous response to Jarvis' statement. Moreover, the company, on its own initiative, had done all it could to relieve the cold *before* the walkout, and there is nothing in the record to indicate that an adjustment of the plant thermostats, if requested, would not have brought forth any aid or protection desired by the employees (App. B of Petition, p. 30). A "protest" envisages a future response, whereas in this case the only indicated response of the company had already been made and its responsibility fulfilled. In other words, the walkout did not accomplish and was not intended to accomplish anything more than had already been done voluntarily by the company. If the men did not realize that corrective action had been taken, they had only themselves to blame.

2. As pointed out by Petitioner (Petition, pp. 10-11), a work stoppage is protected by section 7 as a strike only if it partakes the nature of a true and lawful strike. The term "strike" has not been specifically defined by the National Labor Relations Act, as amended, except insofar as section 501 (29 U.S.C. 142) includes within the meaning of the term concerted work stoppages, slow-downs and other concerted interruptions of operations. The term has been defined by the courts, however, as a quitting of work by a body of workmen to enforce a *demand* made on

the employer or to gain some concession, and a refusal to resume work until the demanded concession shall have been granted.¹³ "[I]t is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will."¹⁴

3. The Act specifically protects a striking worker from discharge only if the strike or work stoppage occurs in the context of a current labor dispute or the employer is guilty of an unfair labor practice. Thus, section 2(3) defines "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice * * *." Section 2(9) defines the term "labor dispute" (App. A, *infra*). The holding in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344-45 (1938), which invoked section 7 to protect a strike as concerted activity, was necessarily based on the existence of a current labor dispute and the interplay of section 2(3) with section 2(9).¹⁵ Mere griping or grouching about the cold on some vague unspecific occasions, without

¹³ *National Labor Relations Board v. Illinois Bell Telephone Co.*, 189 F. 2d 124, 127 (7th Cir. 1951), *cert. denied*, 342 U.S. 885; *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134, 138 (4th Cir. 1937), *cert. denied*, 302 U.S. 731; *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939).

¹⁴ Restatement of Torts, Section 797, comment a. With all due deference to Chief Judge Sobeloff's opinion that notice equivalent to a demand had been given by the employees to the employer (App. B of Petition, p. 36), it is submitted that notice received without time to act upon it is no better than no notice at all.

¹⁵ See also, *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 at 268, fn. 4 (1949); *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134 at 138-39 (4th Cir. 1937), *cert. denied*, 302 U.S. 731; *C. G. Conn, Limited v. National Labor Relations Board*, *supra* at 397.

more, is far too "inchoate" an activity to warrant the protection of section 7. *National Labor Relations Board v. Office Towel Supply Co., Inc.*, 201 F. 2d 838 (2nd Cir. 1953).

4. The unannounced walkout engaged in with intent to return to work the next morning, but without stated purpose and without giving the employer an opportunity to avoid the walkout by negotiation or concession, held to be an unprotected activity by the *Briggs-Stratton* decision,¹⁴ is clearly a case of employees dictating to their employer the terms of their employment. It is settled law that an employee cannot work and strike at the same time nor fix the hours of his employment or the terms and conditions affecting his employment. *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *National Labor Relations Board v. Condenser Corporation of America*, 128 F. 2d 67, 77 (3rd Cir. 1942); *Hoover Co. v. National Labor Relations Board*, 191 F. 2d 380, 389 (6th Cir. 1951); *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111, 113-14 (2nd Cir. 1952), *affirmed*, 345 U.S. 71 (1953); *Home Beneficial Life Insurance Co., Inc., v. National Labor Relations Board*, 159 F. 2d 280, 286 (4th Cir. 1947), *cert. denied*, 332 U.S. 758; *National Labor Relations Board v. Kohler Company*, 220 F. 2d 3, 11 (7th Cir. 1955).

"The *Briggs-Stratton* decision illustrates the developing rule that employees are not engaged in concerted activities when, without going on strike and quitting their employment, they 'continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they care to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do

¹⁴ *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

other work'. The rule has been applied to employees who * * * engage in unannounced work stoppages * * * "17

II.

THERE IS NO CONFLICT OF DECISIONS

The Petitioner strains to the breaking point to assert that the decision below is in direct conflict with *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (6th Cir. 1953), *rehearing denied*, 210 F. 2d 824 (6th Cir. 1954), *cert. denied*, 347 U.S. 976. In that case, the employees complained first to their foreman and then to their manager about conditions of extreme heat ranging from 90° to 97° caused by a malfunctioning air conditioning system. The grievance lasted for five days from April 25 to April 30 before the employees finally staged a walkout. The work stoppage was held protected because it was begun only after working for five days under unreasonable working conditions and only after their demands had been presented to management without effect. In this connection, on rehearing, the Circuit Court said (210 F. 2d at 825):

"The evidence does not sustain respondent's contention that the discharged employees ceased work to win unstated ends. Management was advised of the reason for the stoppage and gave no satisfactory response."

Every decision cited to the court below by Counsel for the Board in which a work stoppage was held protected, involved a current labor dispute or some demand made upon management accompanied by both the opportunity and the deliberate refusal of management to grant the demanded concession (see App. B to Petition, pp. 30-31, fn. 10).

¹⁷ Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319, 337 (1951).

In turn, the decision below for the reasons stated is completely in harmony with every case we have been able to discover which denied section 7 protection to a walkout or work stoppage.¹⁸

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW TO BE SETTLED.

The decisions of this Court and of the courts of appeal cited herein are all reconcilable one with another and in perfect harmony with the principle here involved. The principle is not novel. It is clearly expressed in the decisions of this Court, the courts of appeal and the National Labor Relations Board, and it would serve no useful purpose for this Court to take jurisdiction of this case merely to reiterate or rephrase the same. The fact is that in this case the Trial Examiner and the Board just simply ignored the underlying policy of the Act as manifest in the express provisions of sections 2(3) and 2(9).

Petitioner's argument that section 7 should protect a walkout without advance notice where a working condition

¹⁸ *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949); *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 483, fn. 6 (1960) (dictum); *Textile Workers Union of America v. National Labor Relations Board*, 227 F. 2d 409, 410 (D.C. Cir. 1955) (dictum), cert. vacated, 352 U.S. 864; *National Labor Relations Board v. Ford Radjo & Mica Corp.*, 258 F. 2d 457, 464, fn. 5 (2nd Cir. 1958); *National Labor Relations Board v. Jamestown Veneer & Plywood Corp.*, 194 F. 2d 192, 194 (2nd Cir. 1952); *National Labor Relations Board v. Kohler Company*, 220 F. 2d 3, 11 (7th Cir. 1955); *National Labor Relations Board v. Massey Gin and Machine Works, Inc.*, 173 F. 2d 758 (5th Cir. 1949), cert. denied, 338 U.S. 910 (denying enforcement to 78 N.L.R.B. 189); *National Labor Relations Board v. Reynolds International Pen Co.*, 162 F. 2d 680, 684 (7th Cir. 1947); *National Labor Relations Board v. Condenser Corporation of America*, 128 F. 2d 67, 77 (3rd Cir. 1942); *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *Pacific Telephone and Telegraph Co.*, 107 N.L.R.B. 1547, 1549-50 (1954).

suddenly becomes intolerable (Petition, p. 12) is not persuasive. A walkout in such a situation is plainly and fully protected by section 502 of the Labor Management Relations Act (29 U.S.C. 143), and such protection will be afforded employees even if the walkout was in violation of a no-strike clause in a contract. *National Labor Relations Board v. Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957), cert. denied, 357 U.S. 927.

Nor is this a case where the Court of Appeals introduced "highly subjective judgments into the interpretation" of the term "concerted activities", judgments which rested "upon no discernable standard" — as contended by Petitioner. In the first place, sections 2(3) and 2(9) provide clear and objective statutory standards for determining whether a work stoppage should be protected as a true strike. Secondly, "Section 7 cannot be supposed to protect activities inconsistent with one of the fundamental purposes of the Act * * *."¹⁹ "To the extent that these policies are implicit in the statute and fairly well defined, they furnish a second source of objective standards for defining the scope of 'concerted activities'."²⁰ Courts have regularly decided section 7 cases "without deference to the NLRB" and the relevant factors in a case such as this one "point toward independent judicial determination."²¹ "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve * * *."²²

¹⁹ Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319, 332 (1951).

²⁰ Cox, *op. cit. supra* note 19, at p. 328.

²¹ Cox, *op. cit. supra* note 19, at p. 345; Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1065 (1958).

²² *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944); *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 27, 1961,

APPENDIX A

The pertinent provisions of the National Labor Relations Act, as amended, (49 Stat. 449, 61 Stat. 136, 29 U.S.C. 151, et seq.) not set forth in the Petition, are as follows:

SECTION 1. * * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection (29 U.S.C. 151).

SECTION 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined (29 U.S.C. 152(3)).

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee (29 U.S.C. 152(9)).

SECTION 10. (c) * * *

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause (29 U.S.C. 160(c)).

The pertinent provisions of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) not set forth in the Petition, are as follows:

SECTION 1. (b) * * *

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce (29 U.S.C. 141(b)).

SECTION 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers

and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees (29 U.S.C. 171(a));

SECTION 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent * * * ; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act (29 U.S.C. 143).

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No. 454

In the Supreme Court of the United States

October Term, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

WASHINGTON ALUMINUM COMPANY

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

WRIT FOR THE NATIONAL LABOR RELATIONS BOARD

AMERICAN CUP

Referee General

Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 464

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WASHINGTON ALUMINUM COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 108-125), is reported at 291 F. 2d 869. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 2-23) are reported at 126 NLRB 1410 and 128 NLRB 643.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1961 (R. 126-127). On August 30, 1961, Mr. Justice Black entered an order extending the time for filing a petition for a writ of certiorari to and including October 2, 1961 (R. 128). The petition was filed on October 2, 1961, and was granted on December 4, 1961 (R. 129; 368 U.S. 924). The juris-

diction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 180(e).

QUESTION PRESENTED

Whether employees who walk out in concert to protest objectionable working conditions, without first affording the employer a fresh opportunity to correct them, must be denied the protection which Section 7 of the National Labor Relations Act affords to those who engage in "concerted activities."

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act and the Labor Management Relations Act are set forth in the Appendix, *infra*, pp. 29-31.

STATEMENT

A. The Board's findings of fact

The day shift in respondent's machine shop¹ consisted of nine men—a foreman and eight machinists (R. 13; 26, 33).² Heating for the shop was supplied primarily from an oil-fired furnace (R. 14; 51-52). In addition, the shop contained two gas-fired space heaters of much smaller heating capacity (R. 50). Ordinarily, the furnace was shut down at night and on week ends (R. 14; 61), but in severe cold weather the night watchman was instructed "to turn on all the heaters at regular intervals to protect and main-

¹ Respondent is engaged in the fabrication of aluminum products.

² References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

tain above-freezing condition in the buildings" (R. 15; 61). The shop itself was not insulated (R. 38) and had a number of doors to the outside which were opened and closed frequently during working hours (R. 38, 50).

At various times prior to January 5, 1959, employees in the machine shop had complained to company officials about the cold in the shop during winter months (R. 2-3). Thus, one employee had frequently spoken to the president of the company and other officials about the coldness of the shop (R. 32). Another employee had, "on several of the cold mornings," complained to the foreman, Jarvis, about the insufficient heat coming from the large furnace (R. 35-36). Another employee testified that "on cold days * * * a lot of men worked with their heavy sweaters on or jackets" (R. 26), and that, just two weeks prior to the events described below, all the men had complained to Jarvis about the "cold and miserable" conditions existing in the shop at that time (R. 26, 89).

On the morning of January 5, because of a cold spell and the inability of the watchman to start the furnace, employees coming to work found the machine shop to be very cold (R. 3, 12-15; 32-33, 48-49, 51, 89).¹ One employee noticed that an icicle had formed in the drainpipe of the spot welder which he operated (R. 35). When Caron, another employee, arrived, he went into the foreman's office to get warm,

¹ The average temperature that day was 17 degrees above zero, which was 18 degrees below the normal for that date (R. 87).

as was his custom, but on this morning the office was no warmer than the rest of the shop (R. 12; 27). Caron and Foreman Jarvis discussed the coldness in the building, and then, when "a couple of the fellows walked by * * * huddled," the foreman told Caron, "If those fellows had any guts at all, they would go home" (R. 13; 27, 30).

At 7:30 a.m., the work buzzer sounded, and Caron walked into the machine shop. A group of employees, who were usually working by this time, remained "all huddled there, shaking a little, cold." Caron said to them, "Well, Dave [Jarvis] told me if we had any guts, we would go home * * *. I am going home, it is too damned cold to work" (R. 13; 28, 30). Caron then asked the men what they were going to do. The employees started talking among themselves, saying, "Well, let's go." As Caron started out of the plant, the others followed behind him (R. 13; 30, 90, 93). According to one employee's testimony, the employees had "said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way" (R. 3; 43-44). As Caron was leaving, he saw Jarvis and said, "Dave, it is too cold, I am going home" (R. 13; 28, 31).

When Arthur Wampler, the general foreman, arrived at the plant between 7:45 and 8:00 in the morning, Jarvis informed him that all but one of the men had walked out because it was too cold (R. 61). They then obtained two employees from other shops in the

plant and put them to work in the machine shop (R. 61).⁴

Fred Rushton, respondent's president, arrived at about 8:20 a.m. (R. 15-16; 65). Seeing no one in the machine shop, Rushton said, "We can't have that, Dave * * *. If they have all gone, we are going to terminate them" (R. 17; 65). Rushton, Wampler, and Jarvis thereupon formally decided to discharge the men (R. 16-17; 65-66). All seven men were notified that day (R. 13, 16-17; 28-29, 33, 55). No replacements were hired until sometime later (R. 16; 58).

B. The Board's conclusions and order

On these facts, the Board found, as did the Trial Examiner, that the walkout of the seven employees was a concerted activity in protest against the respondent's failure to supply adequate heat in their place of employment, and that it was thus protected by Section 7 of the Act. Accordingly, the Board concluded that the respondent's dismissal of the employees for engaging in the walkout was a violation of Section 8(a)(1) (R. 3, 18-19). In reaching this conclusion, the Board noted that the employees had

⁴In the meantime, the respondent's electrician had arrived, and the foreman and the night watchman had informed him that the furnace was mechanically inoperative (R. 49, 51). The electrician corrected the furnace malfunction, and it began to work properly at approximately 7:30 a.m. (R. 63). It was not, however, until noon that the temperature in the machine shop returned to normal (R. 54, 64, 66).

in the past complained to the respondent's foreman about the coldness in the plant; that the employees talked the matter over before the walkout; and that they had left the shop in protest over working conditions (R. 3).

The Board's order, insofar as here relevant,* required the respondent to cease and desist from the unfair labor practices; to offer reinstatement to the seven discharged employees; and to make them whole for any loss of wages which they may have suffered by reason of the respondent's discrimination against them (R. 4-5).

C. The decision of the court of appeals

The court below set aside the Board's order (R. 108-124) because none of the employees had, immediately prior to the walkout, made any specific request that the employer rectify the objectionable conditions in the plant. In the court's view, an "important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request

*The Board also found that the respondent violated Section 8(a)(5) of the Act by refusing to bargain collectively with the Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, the certified bargaining representative of the respondent's employees (R. 72-73). This finding depends on the validity of the Section 8(a)(1) findings, since the Union's status as majority representative turns on the ballots cast in the Board election by four of the seven discharged employees. If the four employees were properly discharged prior to the election, they would not have been entitled to vote; if improperly discharged, they were entitled to vote.

made to the employer" (R. 118). Because the "company was afforded no opportunity to avoid the work stoppage by granting a concession to a demand of the employees" (R. 122), the court held that the employees' walkout was not a protected concerted activity.

Chief Judge Sobeloff, dissenting, was of the view that the Board's position "is neither unsupported by the record nor unreasonable * * * [since] the walkout of the seven employees constituted concerted activity protesting the unsatisfactory working conditions in the machine shop" (R. 124). He added that, "[w]hatever notice or demand upon the employer might be required in other circumstances * * * no additional notice or demand was necessary under the well supported findings of this case" (R. 124).

SUMMARY OF ARGUMENT

Section 7 of the National Labor Relations Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

A. 1. In delineating the scope of Section 7, the Board—mindful of the history and purpose of Section 7—has attempted to apply objective criteria which would avoid scrutiny of the fairness or unfairness, or wisdom or unwisdom of peaceful activities which are concerted in fact and do not violate any statutory prohibitions. Thus, the Board, with judicial approval, has denied the protection of Section 7 to employee group activity only where (1)

the objective of the activity would contravene the provisions or basic policies of the Act, or the provisions of a related federal statute, or (2) the means utilized to attain a lawful objective were indefensible by all recognized standards of conduct—such as major violence or similar misconduct, slowdowns, intermittent work stoppages, and the refusal to obey orders while drawing pay. Congress was aware of, and approved, these standards in amending the Act in 1947.

2. Seven employees left the plant in concert to protest the employer's repeated failure to supply adequate heat in the plant. Such a protest, which is the most elementary form of concerted action for "mutual aid or protection," is not inconsistent with the express provisions or basic policy of the Act, nor with the terms of any other federal statute.

3. Nor can it fairly be said that for employees to walk out without first making a demand on the employer to correct an objectionable condition is so indefensible as to warrant a forfeiture of the Act's protection. Where a working condition suddenly becomes intolerable, employees may not always find it possible to give advance notice before walking out, or they may consider a spontaneous walkout to be the most effective way of highlighting their grievance and putting pressure on the employer to alleviate it. Thus, the employees in the present case had complained for some time about the cold. On the morning of the walkout, conditions became so unbearable that even Foreman Jarvis remarked that, "[i]f those 'fel-

lows had any guts at all, they would go home." In these circumstances, the employees were amply justified in walking out without giving the employer a fresh opportunity to rectify the working conditions. The failure of the employees to make a demand upon the employer before walking out did not leave him in any doubt as to the reasons for the walkout or hamper him in attempting to bring the work stoppage to a quick end.

4. The conclusion that the walkout was protected under Section 7 is confirmed by the fact that the walkout was essentially similar to other types of spontaneous strikes which have uniformly been held protected by Section 7. See, *e.g.*, *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6), certiorari denied, 347 U.S. 976.

B. Even if there were an inconsistency between the policy of securing industrial peace by encouraging peaceful collective bargaining and the guarantee of full freedom in the exercise of the right to engage in concerted activities for the purposes of collective bargaining or of other mutual aid or protection, the primary responsibility for achieving an accommodation of these policies would rest with the National Labor Relations Board. In holding that respondent's employees were not engaged in concerted activities protected by the Act, the court below not only read into Section 7 an improper condition precedent, but it also erroneously substituted its judgment for that of the Board—the agency primarily charged with the implementation of the policies of the Act.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE WALKOUT BY THE EMPLOYEES TO PROTEST THE LACK OF ADEQUATE HEAT IN THE PLANT WAS CONCERTED ACTIVITY PROTECTED BY SECTION 7 OF THE ACT

Section 7 of the National Labor Relations Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) implements this guarantee by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In the present case, seven employees were discharged for peacefully walking out together in protest over the employer's repeated failure to supply adequate heat in the plant. Under these circumstances, the employee action was "concerted"; it was for the employees' "mutual aid or protection"; and the employer clearly "interfered with" or "restrained" the exercise of the activity by discharging the employees for it. The discharges therefore violated Section 8(a)(1).

The court below, however, withdrew statutory protection from an indisputably peaceful concerted activity because, in its judgment (see R. 120-121), the employees had not conducted themselves wisely and fairly in failing to discuss their grievance with the employer immediately prior to their walkout, although in fact they had complained of the working condi-

tions on prior occasions without avail. The court's introduction of such a highly subjective judgment into the interpretation of what constitutes "concerted activities" protected by Section 7 of the Act is contrary to the basic thesis of modern labor legislation; it is inconsistent with the principles which the Board, with judicial approval, has applied for many years in determining the scope of Section 7; and it involves the assumption by the court of a function which Congress has entrusted primarily to the expert judgment of the Board. The Board's conclusion that the employees did not forfeit their statutory protection by walking out, without first giving the employer a fresh opportunity to remedy the objectionable working conditions, was reasonable and proper.

A. The work stoppage did not lose its protected status under Section 7 merely because the employees failed to discuss their grievance with the employer immediately prior to the walkout

1. *The court's imposition of a condition precedent on the right to engage in concerted activity is contrary to the purpose and history of Section 7.*^{*}—Prior to the 1930's, most courts treated the concerted action of employees to improve their working conditions as a tortious and enjoined conspiracy whenever they regarded the means or objectives as "unlawful." The only standard of "lawfulness" was each judge's view of the desirability or undesirability of the activities

^{*} See generally Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319 (1951).

in question.' The Norris-La Guardia Act sought to eliminate these subjective judgments from the federal courts' disposition of cases arising out of labor disputes. It specifically restricted the use of the injunctive process in such disputes, and declared "the public policy of the United States" to be that workers "shall be free from the interference, restraint, or coercion of employers of labor * * * in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *" (Sec. 2).⁷ The guarantee of a right to engage in concerted activities provided by Section 7 of the National Labor Relations Act, which is couched in the same terminology as that utilized in

⁷ As Justice Brandeis pointed out in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 485 (dissenting opinion), concerted employee conduct "became actionable when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful." This concept later came under attack, for it "was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful; and that in any event Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands" (*ibid.*).

⁸ Describing the effect of the Norris-La Guardia Act, this Court stated in *United States v. Hutcheson*, 312 U.S. 219, 232: "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit * * * are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

the Norris-La Guardia Act (see *American News Co.*, 55 NLRB 1302, 1314 (dissenting opinion)), was intended further to insulate employees from the common law conspiracy doctrine (see *International Union, U.A.W. v. Wisconsin E. R. Bd.*, 336 U.S. 245, 257-258).

In giving effect to this labor history, the Board, with judicial approval, has attempted to avoid interpreting Section 7 in a manner which would invite scrutiny of the fairness or unfairness, the wisdom or unwisdom, or the desirability or undesirability of peaceful activities which are concerted in fact and do not violate clear statutory prohibitions. Under the Wagner Act, although the literal words of Section 7 could not be interpreted literally as immunizing all group activity, however conducted and without regard to its aim,⁹ the exceptions were limited to situations in which (1) the objective of the activity contravened the provisions or basic policies of the Act, or the provisions of a related federal statute,¹⁰ or (2) the means utilized to attain a lawful objective

⁹ See *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (unlawful seizure of employer's property); *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332 (strike in breach of collective bargaining contract); *Southern Steamship Co. v. National Labor Relations Board*, 316 U.S. 31 (strike which constituted mutiny under Criminal Code).

¹⁰ *American News Co.*, 55 NLRB 1302 (strike to compel wage increase in violation of Wage Stabilization Act); *Thompson Products, Inc.*, 70 NLRB 13, vacated, 72 NLRB 886 (strike to compel employer to violate Board certification); *National Labor Relations Board v. Draper Corp.*, 145 F. 2d 199 (C.A. 4), and *National Labor Relations Board v. Brashear Freight Lines*, 119 F. 2d 379 (C.A. 8) (strike to compel employer to recog-

were "indefensible"¹¹ by all recognized standards of conduct. The latter category included, for example, major violence or similar misconduct,¹² slowdown,¹³ intermittent work stoppages,¹⁴ and the refusal to obey orders while drawing pay."

In amending the Act in 1947, Congress was aware of and approved the principles which the Board and the courts of appeals were applying in defining the scope of Section 7.¹⁵ Since 1947, the Board and the courts have continued to treat concerted activities as protected by Section 7, unless they were "unlawful" in their objective in the sense that the employees were seeking to compel the employer to violate a legal com-

nize a minority union); *Sands Mfg. Co.*, *supra*, n. 9.

¹¹ *Harnischfeger Corp.*, 9 NLRB 676, 686.

¹² See *Fansteel and Southern Steamship cases*, *supra*, n. 9.

¹³ *Underwood Machinery Co.*, 74 NLRB 641, 646-647.

¹⁴ *International Union, U.A.W. v. Wisconsin E.R. Bd.*, 336 U.S. 245.

¹⁵ *National Labor Relations Board v. Montgomery Ward & Co.*, 157 F. 2d 486 (C.A. 8); *C. G. Conn. Ltd. v. National Labor Relations Board*, 108 F. 2d 390, 396-398 (C.A. 7).

¹⁶ As this Court noted in *International Union, U.A.W. v. Wisconsin E.R. Bd.*, 336 U.S. 245, 260-262, the amendments proposed by the House sought to enumerate the types of activities from which statutory protection should be withdrawn. H.R. 3020, 80th Cong., 1st Sess., Sec. 12, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 204-207. In Conference, however, it was decided to retain Section 7 in its original broad form, as proposed by the Senate. The Conference Committee so concluded because "the courts have firmly established the rule that under the existing provisions of section 7 * * *, employees are not given any right to engage in unlawful or other improper conduct," and the Board in "its most recent decisions * * * has been consistently applying the principles established by the courts." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 38-39, Leg. Hist., pp. 542-543.

mand" or unless the means utilized involved major violence or misconduct," or were otherwise plainly indefensible by all accepted standards of conduct.¹⁷ They have continued to refuse to inquire into the wisdom or fairness of the employees' action.

¹⁷ *The Hoover Company v. National Labor Relations Board*, 191 F. 2d 380, 385-389 (C.A. 6) (boycott to compel employer to recognize one union while a representation petition filed by another union was pending before the Board); *American Rubber Products Corp. v. National Labor Relations Board*, 214 F. 2d 47, 50-52 (C.A. 7) (strike to compel a wage increase which would have violated WSB regulations); *W. L. Mead, Inc.*, 113 NLRB 1040 (strike in breach of contract).

¹⁸ *Victor Products Corp. v. National Labor Relations Board*, 208 F. 2d 834 (C.A. D.C.) (forcibly barring ingress to plant); *Hart Cotton Mills, Inc.*, 91 NLRB 728 (assault with deadly weapon); *Old Town Shoe Co.*, 91 NLRB 240 (breaking windows in nonstriker's home).

¹⁹ *Elk Lumber Co.*, 91 NLRB 333, and *Farber Bros., Inc.*, 94 NLRB 748 (slowdown); *National Labor Relations Board v. Reynolds & Manley Lumber Co.*, 212 F. 2d 155 (C.A. 5) (walking off job in such manner as to create dangerous situation); *Carnegie-Illinois Steel Corp.*, 84 NLRB 851, affirmed, 181 F. 2d 652 (C.A. 7), and *U.S. Steel Co. v. National Labor Relations Board*, 196 F. 2d 459 (C.A. 7) (walking out without taking adequate steps to protect plant); *Montgomery Ward & Co.*, 108 NLRB 1175, and *Valley City Furniture Co.*, 119 NLRB 1589, 1594 (refusal to perform assigned work while drawing pay); *The Hoover Company v. National Labor Relations Board*, 191 F. 2d 380, 389-390 (C.A. 6) (conducting a boycott against the employer's product while drawing pay).

National Labor Relations Board v. Local No. 1229, Electrical Workers, 346 U.S. 464, falls within this category of indefensible conduct because of the union's failure to inform the public of any connection between the pending labor dispute and a published attack upon the employer's product. The Court accordingly found the attack "as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending." 346 U.S. at 477.

2. The walkout was not inconsistent with the terms or policy of any federal enactment.—Respondent's employees walked out to protest respondent's failure to supply adequate heat for the plant. Such a protest, which is the most elementary form of concerted activity for mutual aid or protection, is not inconsistent with the express provisions or basic policy of the Act, nor with the terms or policy of any other federal statute.

In setting aside the Board's order, the court below held (R. 118) that an "important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer." The court sought to derive support for this conclusion from the policy of the Act "to secure industrial peace and prevent strife and disruption by encouraging negotiation and peaceful procedure for the attempted settlement of the demands of a party" (R. 117).

Although Section 1 of the Act declares the public policy of the United States to be to encourage "the practice and procedure of collective bargaining," this provision does not authorize a court to impose upon employees the duty of conducting themselves in whatever way that tribunal thinks will be conducive to industrial peace. Nor does it authorize a court to qualify rights granted by the Act by imposing conditions precedent which the court believes are prerequisites to sound collective bargaining. The statute itself declares the congressional plan for encouraging collective bargaining and advancing industrial peace, and

the statute itself creates the rights and obligations. A major part of the policy of encouraging the practice and procedure of collective bargaining was the more specific intention of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (Sec. 1). Sections 7 and 8(a)(1) furnish this protection by forbidding interference with "the right * * * to engage in other concerted activities for the purpose of * * * mutual aid or protection." Nothing in the Act requires advance notice or negotiations with the employer as a condition precedent to engaging in a strike or spontaneous work stoppage, except under special circumstances arising under an existing collective bargaining agreement." On the contrary, Section 501(2) of the Labor Management Relations Act defines the term "strike" very broadly to include "any strike or other concerted stoppage of work by employees * * * and any concerted slow-down or other concerted interruption of operations by employees." And Section 13 of the National Labor Relations Act, as amended, expressly provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to

²⁰ Where there is a collective bargaining contract, Section 8 (d) requires a 60-day notice of contract termination or modification, during which time the parties are precluded from "resorting to strike or lock-out." See *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282.

strike . . .” See *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665, 672-673; *National Labor Relations Board v. Drivers, Local 639*, 362 U.S. 274, 282.”

3. *The employees were not required to discuss their grievance with the employer prior to the walkout.*—For employees to walk out without first making a demand on the employer to correct an objectionable condition is not so indefensible, when evaluated in the light of industrial realities and the possible injury to employer interests, as to warrant a forfeiture of the Act’s protection. At the time of the walkout, the employees had no bargaining representative; nor was there a collective bargaining agreement in effect which prescribed a grievance or other procedure for promptly processing or adjusting grievances.

In addition, where a working condition suddenly becomes intolerable, it may not always be possible for the employees to give advance notice before walking

“In concluding that ‘the office of a demand [is] a condition upon the use of concerted pressure,’ the court below relied (R. 118) on *Jeffery-De Witt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134, 138 (C.A. 4), where the court, in rejecting the contention that strikers lost their employment status by not returning to work when the plant was reopened, noted that ‘strike’ was defined as ‘the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused.’” But, the court in *Jeffery-De Witt* was merely referring to one of the many definitions given to the term “strike” at common law, and was not holding that the term was necessarily that limited for purposes of the Act. Similarly, the definition in the Restatement of Torts, Sec. 797, also relied on by the court below (R. 118, n. 8), does not apply to the Act. See also *Phelps Dodge Corp. v. National Labor Relations Board*, 113 F. 2d 202, 205 (C.A. 9), affirmed, 313 U.S. 177.

out. Even if the employees could select a more prudent or desirable method for achieving their objective—such as awaiting repairs to defective equipment (see R. 119) rather than walking out in concert—the work stoppage is nevertheless protected under Section 7.” Thus, even where notice to the employer is possible, the employees may nevertheless believe that a spontaneous work stoppage is the most effective means of emphasizing the seriousness of their grievance and of exerting the maximum pressure on the employer to alleviate it.

The facts of the present case illustrate this point. The employees had been complaining for some time about the lack of adequate heating facilities and the cold in the shop during the winter months. As detailed in the Statement, *supra*, pp. 3-4, one employee had remarked to President Rushton and other company officials about the coldness in the shop, and another employee had complained to Foreman Jarvis about the insufficient heat coming from the main furnace. Employee Caron testified that, just two weeks prior to the walkout, all of the men had complained to Jarvis about the “cold and miserable” conditions

²² See *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344; *Firth Carpet Co. v. National Labor Relations Board*, 129 F. 2d 633, 636 (C.A. 9). The court below stressed the fact that, at the time of the walkout, the respondent already had the furnace repaired and functioning, and that, had the employees made a demand, they would have ascertained this fact or possibly would have obtained some other adjustment (R. 119). But even the court acknowledged that “the shop was undeniably cold at the time the men left” (R. 119), and the record shows that the temperature did not return to normal until noon—about 4½ hours after the walkout (see n. 4, *supra*, p. 5).

in the shop. On the morning of the walkout, the shop was so cold that an icicle had formed in a drainpipe of a spot welder and the employees were walking about all "huddled" up and "shaking." Foreman Jarvis was impelled to state, "If those fellows had any guts at all, they would go home." In these circumstances, the employees could well have believed that they had given the employer so much notice about the problem in the past that he was not entitled to a fresh opportunity to rectify the condition and, if results were to be obtained, more dramatic steps should be taken. As one employee testified, "[W]e had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." Besides, conditions on the morning of the walkout were so intolerable that any thought of work seemed to be out of the question; it was natural to think only of retiring, temporarily, to a warmer shelter away from the plant—a suggestion which Foreman Jarvis made himself.

The failure of the employees to demand more heat before walking out did not leave the employer in any doubt as to the reasons for the walkout or hamper him in attempting to bring the work stoppage to a quick end. The history of prior complaints and the conditions on the morning of the walkout made obvious the reason for the walkout. Employee Caron told Jarvis that he was leaving because it was "too cold" (R. 13, 28). Both Jarvis and General Foreman Wampler admitted knowledge of the reason for the walkout at the time they participated in the

decision to discharge the men (R. 53-54, 58, 61). As Wampler testified, the "first step that I took [on arriving at the plant] was to find out why [the employees walked out], and I was informed that it was 'too cold' " (R. 61). In this situation, it would exalt form over substance to conclude that the employer could not be expected, absent a formal demand by the employees, to know why they walked out and what he would have to do in order to get them to return." Just as promptly as he decided to discharge them for their action, the employer could have assured them that the furnace was repaired and that the plant was warming up, and he could have appealed to them to return to work, at least by afternoon. Since the employees had no intention of staying out for a prolonged period (R. 28, 34, 36, 55, 90, 98), the employer, had he followed that course, would in all probability have persuaded them to return without an undue loss of production. Instead, he took the drastic action of discharging the employees—an action all out of proportion to what was required to remedy the problem confronting him.

In this setting, the Board properly concluded that it was not unreasonable for the employees to resort to economic pressure without first making a formal demand upon the respondent to rectify the cold working conditions. The Board's determination was thus entitled to stand and the court below was not warranted in substituting its own independent

²² Cf. *International Ladies' Garment Workers' Union v. National Labor Relations Board (Walls Mfg. Co.)*, No. 16124 (C.A.D.C.), January 25, 1962, 49 LRRM 2483, 2484.

judgment that the employees left their jobs with "no reasonable justification" (R. 122)."

4. *The walkout was essentially similar to other spontaneous strikes which have uniformly been held protected by Section 7.*—The Board's conclusion that the walkout here was protected by Section 7 is confirmed by the fact that the walkout was essentially similar to other spontaneous strikes which have uniformly been held protected by Section 7. In *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6), certiorari denied, 347 U.S. 976, the court held that "the spontaneous walk-outs and temporary work stoppages by the respondent's employees

"The discharges cannot be justified because the walkout was allegedly in violation of an unwritten (R. 95) company rule against leaving the job without permission (R. 122). If the walkout be protected concerted activity under Section 7, any company rule purporting to bar the activity would have to give way to the statute. See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 783. Accordingly, the discharge would not be "for cause" within the meaning of Section 10(c) of the Act, which provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." As Senator Taft pointed out, this provision "merely states the present rule" (93 Cong. Rec. 6518-6519); that is, where an employee is discharged for reasons condemned by the Act, the Board is to afford a remedy, but where the discharge is for some other reason, the Board is not to provide a remedy. See *National Labor Relations Board v. Dixie Shirt Co.*, 175 F. 2d 939, 974 (C.A. 4); *National Labor Relations Board v. Sandy Hill Iron & Brass Works*, 165 F. 2d 680, 692 (C.A. 3); *National Labor Relations Board v. Eastern Mass. Street Railway Co.*, 235 F. 2d 700, 709 (C.A. 1); *National Labor Relations Board v. Carolina Mills, Inc.*, 167 F. 2d 212, 213 (C.A. 5). "In every case it is a question of fact for the Board to determine" (93 Cong. Rec. 6518).

in protest against what they not unreasonably considered excessive heat in the factory building constituted concerted activity for mutual aid or protection within the meaning of Section 7 of the National Labor Relations Act." In *National Labor Relations Board v. Solo Cup Co.*, 237 F. 2d 531 (C.A. 8), a group of employees suddenly, and without prior warning, shut down their machines to protest to management the discharge of a co-worker. The court held the action protected, stating (237 F. 2d at 536): "The employees might well have exercised better judgment by sending a committee to the management at a more convenient time for making their protest and demand, but we are unable to conclude that ill judgment or lack of consideration add up to illegality." Similarly, in *National Labor Relations Board v. Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3), the employees spontaneously gathered during working hours and sought to present their grievances to the employer, but without avail. The court declared (182 F. 2d at 819) that "[w]hat occurred in this case was certainly * * * the kind of activity which is expressly protected by Section 7 * * *," and added that "the statute would have protected them against interference or coercion if instead of insisting upon immediate discussion of their demands they had then and there left the plant and formed a picket line outside." "

^a Accord, *National Labor Relations Board v. J. I. Case Co.*, 198 F. 2d 919, 922 (C.A. 8), certiorari denied, 345 U.S. 917; *Modern Motors, Inc. v. National Labor Relations Board*, 198 F. 2d 925, 926 (C.A. 8); *National Labor Relations Board v. Cowles Publishing Co.*, 214 F. 2d 708 (C.A. 9), certiorari denied, 348 U.S. 876; *National Labor Relations Board v. Knight Merley*

That the protection of Section 7 is not limited to situations where the employer has first been afforded an opportunity to adjust the employees' grievance is further shown by the cases which hold that a discharge of employees who are in fact engaged in concerted activity is unlawful even when the employer had no knowledge of that activity, or even when, if he did, he was mistaken as to its protected character.²⁶ In some of these cases, as the court below noted (R. 120), the grievance may have been discussed with the employer prior to the work stoppage. None of the decisions turned on this factor, however. The decisions rested, rather, on the broad ground that the Act does not require employees to go through any formality before they may take concerted action for their mutual aid and protection.²⁷

Corp., 251 F. 2d 753 (C.A. 6), certiorari denied, 357 U.S. 927; *Gullet Gin Co. v. National Labor Relations Board*, 179 F. 2d 499 (C.A. 5), reversed on other grounds, 340 U.S. 361.

²⁶ See *Home Beneficial Life Ins. Co. v. National Labor Relations Board*, 159 F. 2d 280, 285 (C.A. 4), certiorari denied, 332 U.S. 758; *National Labor Relations Board v. West Coast Casket Co.*, 205 F. 2d 902 (C.A. 9), enforcing 97 N.L.R.B. 820, 823; *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 902-903 (C.A. 3); *National Labor Relations Board v. Industrial Cotton Mills*, 208 F. 2d 87, 90-93 (C.A. 4), certiorari denied, 347 U.S. 935.

²⁷ *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457 (C.A. 2), is not to the contrary, as the court below seems to have assumed (R. 120). There, unlike here, the circumstances were such as to afford the management no inkling as to the reason for the strike, and its repeated efforts to ascertain the reason from the strikers were met with evasion. (See R. 125, n. 1, Sobeloff, C.J., dissenting.) The Second Circuit carefully distinguished cases of spontaneous strikes in which "the circumstances were such that the management must have known the issues" (258 F. 2d at 464).

B. The court of appeals erred in substituting its judgment for that of the National Labor Relations Board

In holding that respondent's employees were not engaged in concerted activities protected by the Act because they had not satisfied the "important and necessary qualification of the right to exert pressure on an employer through work stoppages * * * that such pressure be exerted in support of the demand or request made to the employer" (R. 118), the court below not only read into Section 7 an improper condition precedent, but it also erroneously substituted its judgment for that of the agency primarily charged with the implementation of the policies of the Act. For reasons already stated (*supra*, pp. 16-17), we think that Congress found no inconsistency between the policy of securing industrial peace by encouraging peaceful collective bargaining and the guarantee of full freedom in the exercise of the right to engage in concerted activities for the purposes of collective bargaining or of other mutual aid or protection. Even if some inconsistency were thought to exist, the primary responsibility for achieving an accommodation would rest with the National Labor Relations Board. For while affording an employer an opportunity to rectify objectionable working conditions before resorting to a strike may often advance the aim of encouraging collective bargaining, to impose that condition automatically in every case not only may impinge upon the competing policy of safeguarding the employees' rights to engage in concerted activity for mutual aid or protection but also in the long run

may interfere with the development of sound collective bargaining relations. In some cases the issue might come down to whether the employer had had notice enough, or to whether the conditions were so aggravated that no notice could fairly be required. In any event the ultimate problem, as in *National Labor Relations Board v. Truck Drivers Local No. 449*, 353 U.S. 87, 96, involves "the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." See also *National Labor Relations Board v. Local No. 1229, Electrical Workers*, 346 U.S. 464, 480 (dissenting opinion). Congress could not spell out in advance all the activities protected by Section 7; it met this difficulty by leaving the adaptation of means to end to the empiric process of administration. Cf. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194. Since "the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially," the Board's determination is to be accepted "if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 131.

In the present case the Board's ruling that the employees' conduct constituted protected concerted activity satisfied these criteria and should have been accepted by the court of appeals.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with directions to enforce the Board's order in full.

Respectfully submitted.

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MARCH 1962.

APPENDIX

The relevant provisions of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*, are as follows:

SEC. 1. * * *

* * * * *

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

Sec. 10(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . .

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

The relevant provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. 141, *et seq.*, are as follows:

Sec. 501. When used in this Act—

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

APR 3 1961

JOHN F. DAVIS, CLERK

No. 464

IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WASHINGTON ALUMINUM COMPANY, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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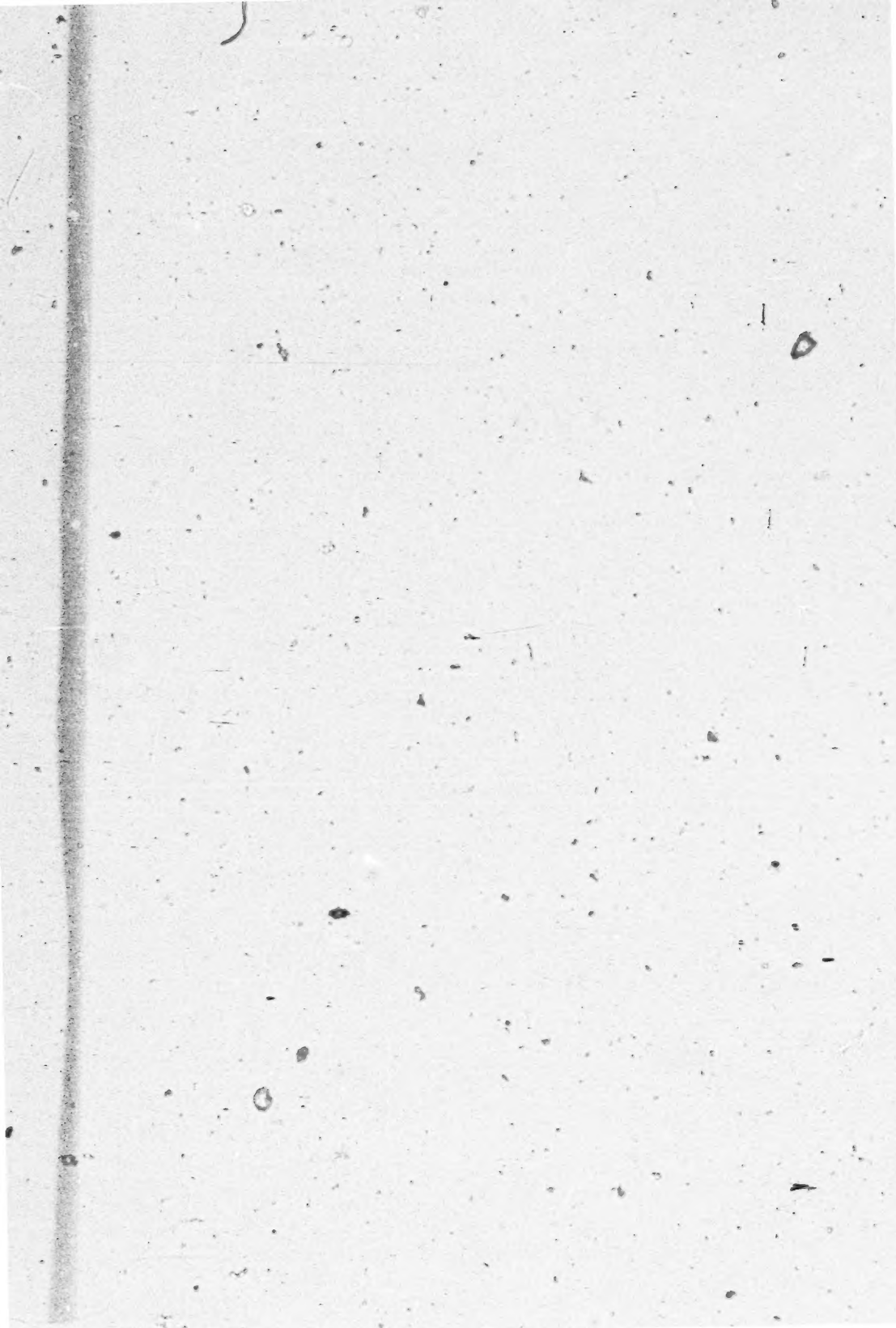
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 464

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WASHINGTON ALUMINUM COMPANY, INC.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW AND JURISDICTION

The opinions below and the jurisdictional requisites are adequately set forth in the Brief for the Petitioner.

QUESTIONS PRESENTED

1. Whether a spontaneous, unilateral walkout because of (not in protest of) cold conditions, in the complete absence of a current labor dispute or a purpose to bargain collectively over pre-existing conditions, constituted "other concerted activities for the purpose of collective bargaining or other mutual aid or protection", within the meaning of Section 7 of the National Labor Relations Act.

2. Whether the National Labor Relations Board may order reinstatement of discharged employees who had

engaged in an "economic strike" in the absence of findings of fact showing the existence of a current labor dispute, within the meaning of Sections 2(3) and 2(9) of the National Labor Relations Act.

3. Whether the Respondent lawfully discharged "for cause", within the meaning of Section 10(c) of the National Labor Relations Act, certain employees who violated plant rules by leaving their jobs without permission and without informing their foreman of their intentions.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, the Labor Management Relations Act and other statutes not set forth in the Brief for the Petitioner are set forth in Appendix A, *infra*.

STATEMENT

The Brief for the Petitioner, as in the case of the Trial Examiner's Intermediate Report (R. 8) and the Board's Decision (R. 2), makes inadequate reference to Respondent's evidence which proves that the cold condition of the plant on the morning of January 5 did not represent normal working conditions or a continuation of pre-existing working conditions which were the subject of a pending grievance or labor dispute. All three said writings disregard without reason Respondent's evidence which points only to the conclusion that the walkout occurred in response to a jocular statement made by Respondent's foreman and because the plant was cold as the result of momentary misfiring of a furnace, not as an economic strike in protest against pre-existing cold working conditions. This case presents an illustration of the Board's breach of the unequivocal mandate of Congress that the Board must "not infer facts that are not supported by evidence or that

are not consistent with evidence in the record", that it must "not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings", and that it must not indulge in "the substitution of expertness for evidence in making decisions".¹ The Board's use of a simple syllogism is apparent: there was a strike; the strike was in response to working conditions and hence was an economic strike; the Act protects economic strikers from discharge. The fallacy of this syllogism, as often is the case, stems from its bare simplicity. Accordingly, the facts require more extensive treatment than that given by the Board's counsel.

*There Was No Current Labor Dispute Over
Cold Working Conditions*

The Respondent is engaged in the fabrication of aluminum products in a plant located at Baltimore, Maryland. In January, 1959, only nine of its employees were assigned to its relatively small machine shop — a foreman (Jarvis), the seven men who are involved in this case, and one other machinist (Tafelmaier). Respondent's machine shop area, being a part of B shop and measuring approximately forty by seventy-five feet, was heated by two gas-fired space heaters of 85,000 B.T.U. output.² Its primary supply of heat, however, came from an oil-fired furnace with a capacity of 1,500,000 B.T.U. situated in A shop which was separated from B shop by a partition. The heat from this main furnace flowed generally and by means

¹ H. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 56.

² The B.T.U. was explained in technical terms in the testimony (R. 99)

of directional ducts into the machine shop area through two doorways ten feet wide and eight or nine feet high and through the two top rows of windows of the partition, the window lights of which had been knocked out (R. 49-50, 64, 95, 98).³ In addition, the Respondent attempted to provide warmer working conditions in late November, 1958 (less than two months prior to the January 5 walkout), when it installed an additional 500,000 B.T.U. furnace in A shop (R. 64), the heat from which also flowed into the machine shop through the open windows and doors above mentioned.

The Trial Examiner's Intermediate Report failed to advert either to the plant's heating system or to any pre-existing cold working conditions. The Board, however, realizing the significance of these omissions, attempted to equate the unusual, non-recurring cold condition of the plant on one of the coldest mornings of the winter with pre-existing working conditions by pointing to "the credited testimony of employees Heinlein, Caron and George as to previous complaints made to Respondent's foremen over the cold working conditions" (R. 3). A review of this testimony, however, shows it to be so vague, unspecific and so completely unrelated to the condition on the morning of January 5 as to be entitled to no weight or materiality whatsoever. It manifestly was no more than the universal resort to the state of the weather as a topic of conversation.

The evidence of the installation of the 500,000 B.T.U. furnace in A shop within less than two months of the January 5 walkout destroys whatever vague value the Heinlein testimony had deserving of consideration by the

³ A floor plan showing both the location and capacity of all heating units, was introduced in evidence as General Counsel's Exhibit No. 3.

Board.⁴ The testimony of George⁵ and Caron⁶ was similarly vague and unspecific. The most that the testimony of these men proved is that three men, individually, not in concert, may have "remarked", "asked" or "talked" about the cold to their foreman or an estimator or a production coordinator on some vague occasion or another.⁷ The remaining four of the seven machinists involved in the walkout did

⁴ Heinlein testified he frequently "remarked" to Rushton, Esender and, he "thought", to Campbell about the cold; but he could remember no specific date or time (R. 32). When cross-examined as to the specific days he spoke to Rushton, he said "Well, I couldn't say what day. It may have been two or three times during the six months before that. Maybe a year before that. Maybe two years." (R. 33-34). Thus, Heinlein's testimony cannot possibly support a finding of a current dispute. The Board is in error in finding that Heinlein complained to Respondent's foremen (R. 3). In the winter of 1958-59, Esender and Campbell were not even supervisors of Heinlein. Esender was a production coordinator; Campbell was in the estimating department in an entirely different building (R. 60). Wampler was general foreman over Jarvis and the men (R. 60); Tarrant was plant manager (R. 59); Rushton was President. Rushton had been out of the shop for 2½ or 3 years; although prior to that he had had some gripes (R. 64).

⁵ "Q. (By Mr. Wescott) Who did you complain to? A. Mr. Esender and Mr. Jarvis. Q. Can you recall any specific time that you complained to Mr. Jarvis? A. On several of the cold mornings I asked Mr. Jarvis, [the foreman] why the large furnace wouldn't put out more heat" (R. 35).

⁶ "Q. Did you ever make any complaints to anybody concerning that? A. I used to talk to Dave [the foreman] that it was cold and miserable. *** Q. (Trial Examiner) On what day was this, now? A. (The Witness) Not any special day. On cold days." Caron went on to testify that he never complained to any other company official and that the only specific day he could think of that he complained to the foreman was, he "thought" as to a cold spell two weeks prior to January 5 (R. 26-27). *This testimony was not corroborated by any of the other men.*

⁷ A reading of the transcript will show that while the Board's counsel used the words "complain" or "complaint", the witnesses' respective responses characterized prior mention of cold conditions by the words "remarked", "asked" and "used to talk". Only Caron, after being led by Board's counsel, testified that "we were all complaining then" as to a cold spell two weeks prior to January 5 (R. 26, 89). This uncorroborated testimony was of course hearsay as to any one but himself.

not even testify as to any previous "complaints." There is no evidence whatsoever that any previous "complaints" were made as the result of concerted activity on the part of the men. The men never asked Jarvis to go to someone higher up in the management (R. 51). The foreman and higher management were totally unaware of any specific request that action be taken or of any demand that more heat be brought into the plant.

The "complaints" to Jarvis, the foreman, were nothing more than "general griping". "It is either too cold or too hot * * *. I always accepted these things as the sort of griping that is done in a shop" (R. 50-51). Tarrant, Wampler and Rushton corroborated Jarvis and were unanimous in their testimony that the general gripes about the cold were in the course of normal conversation and the same sort of gripes as the gripes made about the heat in the summertime (R. 59, 60, 64-65).

The record in this case is devoid of any evidence whatsoever of a pending grievance about cold working conditions or of a pending demand or request, general or specific, made by the men, individually or in concert, that more heat be supplied to the machine shop area. As the Court of Appeals pointed out, the men had not even made a simple request of the plant maintenance man that he turn up the thermostats on any or all of the various heaters and furnaces (R. 120).

The Board made no specific finding that a current labor dispute existed, apparently under the assumption that Sections 2(3) and 10(c) did not require such a finding. Clearly this assumption allowed the Board to reach its

* The eighth machinist, Tafelmaier, was asked by the Board's counsel: "Q. (By Mr. Wescott) Did you ever complain to Mr. Jarvis about the heat in the plant? A. No" (R. 47).

conclusion with less difficulty; for to dignify the testimony above mentioned as evidence of a current labor dispute within the meaning of Sections 2(3) and 2(9) is patently absurd.

*The Cold Conditions on January 5 Were Fortuitous,
Momentary and Completely Unrelated to
Pre-existing Working Conditions*

There is no question that at the time of the walkout, working conditions in the plant were less than comfortable by reason of a cold wave, accentuated by the watchman's inability to start the main furnace which heated the plant. However, these conditions were in no sense of the word normal working conditions, but were completely fortuitous, and were corrected by Respondent on its own initiative as soon as possible.

The morning of January 5 was one of the coldest experienced in the Baltimore area during the winter of 1958-59 (R. 47). The temperature at 8:00 A.M. was 15°. The high for the day was only 22°; the low reached 11°; and the day's resultant average temperature was only 17°, representing minus 18° deviation from normal (R. 87). The freezing temperatures were accompanied by northwest winds averaging 24.4 m.p.h. with gusts up to 48 m.p.h. (R. 87), the highest wind velocities recorded for the entire month (R. 110; G. C. Ex. 2). Six of the seven men honestly admitted that the plant was much colder than on other Monday mornings of that winter (R. 34, 36, 39, 40, 42, 43). Only the shop leader, Caron, the Board's most important witness, refused to admit this obvious fact (R. 30). He said, "I don't remember".

Respondent's witnesses also made it unequivocally clear that the cold condition in the plant had no relation to pre-

existing or normal working conditions. Jarvis explained it saying that when he arrived that morning the main furnace was not functioning (R. 51). Tafelmaier, the eighth machinist (the only one who did not join the walkout), wore his overcoat at his machine from 7:30 until 10:30 A.M., at which time he took it off, comfortable working temperatures having been restored. This was the only morning of the entire winter that he wore an overcoat (R. 46-47). The Trial Examiner himself found (R. 14) "There can be no doubt whatever on the record herein that on January 5, the Respondent's plant was somewhat colder than usual."

Respondent was fully aware of its responsibility to combat cold conditions. The night watchman had standing instructions to turn on all furnaces and heaters at such regular intervals as may have been necessary to maintain suitable temperatures throughout the plant on cold nights and weekends (R. 48, 61). And at 10:00 P.M. on the very cold Sunday evening before the walkout, the company president himself had visited the plant to make sure that adequate heat would be provided the employees the following morning (R. 65).

On the Monday morning in question, the watchman, pursuant to orders, had actually turned on the space heaters and the 500,000 B.T.U. furnace at 1:00 A.M., (for one and one-half hours) and again at 5:00 A.M.; ironically however, he was unable to start the 1,500,000 B.T.U. main furnace at either time (R. 48). He notified the company electrician of the difficulty at or about 7:15 A.M., as soon as the electrician arrived at the plant. The electrician immediately diagnosed the trouble as a simple matter of manipulating a control switch at the rear of the furnace, and the furnace was put into operation within a minute or two

after the starting bell rang at 7:30 A.M. (R. 63). By 7:45 A.M., the main furnace was burning at full capacity. By 10:00 or 11:00 A.M., the plant was warm (R. 46, 56, 64). By lunchtime, the plant was heated to normal working temperatures and the men were working, as they did ordinarily, in their denim shop coats (R. 56-57, 96-97).

In the face of this evidence, the Trial Examiner (R. 17) and the Board (R. 3) concluded that the walkout at 7:35 or 7:40 that morning, was in protest of "working conditions." They did not and could not find, however, that these "working conditions" were a continuation of pre-existing working conditions or that Respondent had any other intention than to correct them immediately.

The Walkout Was Not Intended As A Protest But Was Rather A Temporizing Response To the Cold and to the Foreman's Statement Made to Caron.

On the morning of January 5, David Jarvis, the foreman of machine shop, arrived at the plant sometime after 7:10 A.M. Finding the plant unusually cold, he discovered that the main furnace in A shop was not functioning and searched out the watchman. He and the watchman then contacted the company electrician as soon as he came in and immediately put him to work on the furnace (R. 51). Jarvis then went to his office in the machine shop. At about 7:20 A.M., Caron, the leader in the machine shop, came in and they talked about how cold it was (R. 27). Some men walked by outside the office and Jarvis, in a facetious way, said to Caron, "If those fellows had any guts at all, they would go home" (R. 27), or perhaps he said, "If we had any guts, we'd go home." He does not remember whether it was "we or they", whether it was "personal or plural" (R. 52). In any event, he gave the statement no significance at the time, having frequently talked with Caron in a

jocular way." Jarvis then left his office to take a finished part to the shipping department with shipping papers (R. 53).

At about this time, the other employees of the machine shop began reporting for work. The buzzer sounded and the men were standing around, cold, and Caron said to them, "Well, Dave told me if we had any guts, we would go home." Caron continued, "I am going home, it is too damned cold to work" (R. 28). Caron then said to the men, "What are you fellows going to do?" and they told him they "were going home also because it was too cold to work" (R. 90). Caron then walked out (R. 28), but he did not punch out his time card (Resp. Ex. 1). The six other machinists followed Caron out, punching their time cards upon leaving the plant at the following times: 7.6M, 7.6M, 7.6M, 7.7M, 7.7M and 7.7M (Resp. Ex. 2). The numerals after the decimal points represent tenths of an hour or six minutes for each tenth. Thus, it is clear that the men walked out less than twelve minutes after the 7:30 A.M. starting buzzer had sounded.

Jarvis returned from the shipping department to his office by going across the center of A shop through the

• (The Witness) * * * But I have to qualify this in the sense that it was partly Mr. Caron and my relationship. I don't know how to suitably put that into words.

"Q. (By Mr. Bair) Well, do the best you can? A. Well, we — I tried to be most frank with Mr. Caron on everything that we did. I tried to have here a man that if need be could replace me in the shop, or was fully aware of what was going on. We also worked together, as I said before; and, therefore, I was under the impression that things of this nature that we had said and had been said prior to this at various times, such as if we had a bad job, why, I think — I think one specific job, I remember we had a landing gear we were working on. Something went wrong with it. And remarks were made to the sense that 'grab your tool box and let's go, this job is all fouled up.' Something of that nature. This was more or less our relationship. I don't know how I can dress that up anymore, or make it any clearer" (R. 52).

center door on the west side of A shop, then down towards the machine shop area to his office (Tr. 142). He got back to his office a few minutes past 7:30 A.M. From the door of his office, he saw the men walking across A shop towards the time clock on the other side of A shop (R. 53-54, 97). William George hollered to him, "We are going home. Do you want to come with us?" (R. 53). Jarvis was "flabbergasted" (R. 58); he thought the men were kidding (R. 53); his first thought was that it was "a put-up joke or something of that nature" (R. 58).¹⁰ Just then, Tafelmaier came walking by, hesitant and looking puzzled. When Jarvis asked him where he was going, Tafelmaier replied that he guessed he would go too. Jarvis said, "Well, now, just hold on a minute." As he talked to Tafelmaier, the other men went out the door (R. 94). Jarvis told Tafelmaier that walking out "wasn't the thing to do" and that if he had another coat he should get it and put it on. Tafelmaier stayed and subsequently Jarvis put him to work (R. 53).

Jarvis then reported the walkout to Wampler, the general foreman, and to Rushton, the President, as soon as they arrived that morning (R. 54). Wampler realized that the company had critical jobs in the machine shop and took steps to supply Jarvis with two other men to carry on these jobs (R. 54, 61). Notwithstanding this, the machine shop operation was seriously curtailed (R. 56, 61).

¹⁰ Caron testified he met Jarvis near the time clock on the way out and told Jarvis that it was too cold and that he was going home (R. 28). Jarvis denied this (R. 96), saying that the only man who hollered to him as the men were walking out was Bill George (R. 53-54). Heinlein and Adams also testified they talked to Jarvis on the way out (R. 33, 96) which Jarvis denied (R. 54, 96). The conflict in the evidence is unimportant. The seven men did not contend, but rather denied, that they had Jarvis' permission to leave (R. 32, 34, 37, 39, 40, 43, 44, 89). Moreover, Jarvis' permission would not have availed. To allow the seven men to go home, and thus close down the machine shop, Jarvis would first have had to consult Wampler, the general foreman, or Tarrant, the plant manager (R. 95).

The basic reason for the walkout testified to by all seven men was that it was in response to the invitation or dare contained in Jarvis' jocular or facetious statement made to Caron and relayed by Caron to the men to the effect that if they had any guts they would go home (R. 27-28, 30, 33, 37, 38, 40, 42, 45). The men also testified that the second reason they went home was that it was too cold to work that morning.¹¹ But an objective appraisal of all the evidence makes it plain that without the encouragement or the "dare" extended to the men by Caron in the form of Jarvis' statement, the men would never have walked out of the plant that morning simply because it was cold. The operations of a fabricating plant do not and can not stop in cold weather. It was frequently necessary from the nature of the business to open the doors to the outside to bring in raw materials and to take out finished products (R. 50).

That Jarvis' statement was basically responsible for the walkout can best be established by referring to testimony

¹¹ The Trial Examiner and the Board (R. 3, 14) and the Board's Brief (page 20) place emphasis upon the so-called "credited testimony" of Hovis, which was admitted in evidence over Respondent's motion that it be stricken and which reads as follows (R. 43-44):

"Q. (By Mr. Bair) Now, why did you leave the plant on Monday morning with these other men? A. Well, they said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way."

The answer of Hovis was not only completely unresponsive to the question, but it represented self-serving hearsay testimony, involving not only subjective thinking of the witness but the subjective thinking of others. It is hearsay, guess and speculation of the witness as to the state of mind of others. Moreover, the testimony is so completely discredited by other testimony of Hovis given previously before the Maryland Department of Employment Security, as to be not worthy of belief. This testimony is discussed below. (Compare the Trial Examiner's ruling on this point with his ruling when counsel for Respondent asked Caron if he "thought" Jarvis was serious in making the "had-any-guts" remark (R. 90). Compare also the Trial Examiner's ruling on Rushton's testimony as to the discussion which took place prior to the disciplinary action (R. 66).)

given by three of the seven men in a prior unrelated proceeding, at a time when the men were unaware of the importance which their testimony would have on their rights under Section 7 of the National Labor Relations Act. On February 24, 1959, Affayroux and Hovis testified before the Maryland Department of Employment Security and, on April 6, 1959, Olshinsky testified before the same Department. The three men were seeking to recover unemployment compensation after the Company had objected to their claims on grounds that the men had been discharged for cause as a disciplinary measure. At the hearings before the Maryland Department of Employment Security, Affayroux testified that "The leader of the machine shop stated that the foreman had said that it was too cold to work and we would be fools if we did not go home" and that "as a result of this statement by the leader [I] left the job along with the other men" (R. 42-43).

Olshinsky at first denied that he testified before the Maryland Department of Employment Security to the effect "that the leader of the machine shop told the employees that they could go home because it was too cold to work in the shop" (R. 40), but he later went on to admit that he testified before the Maryland Department that he was of the opinion that if the foreman wasn't there, the leader had authority to permit him to go home (R. 40). After some discussion at the hearing before the Trial Examiner, it was eventually stipulated between the parties "that Frank Olshinsky appeared before an Appeals Referee of the Maryland Department of Employment Security on April 6, 1959 and testified that it was customary to take orders from the leader, and that he was of the opinion that the leader had the authority to permit them to go home" (R. 41).

Similarly, Hovis testified before the Maryland Department of Employment Security that the leader of the machine shop had told him that it was too cold to work and that the men were going home, that he had never questioned Caron's authority before and that he assumed that the leader was speaking for the foreman (R. 44-45).¹² Compare this testimony with his testimony set forth in footnote 11, *supra*.

Parenthetically, it should be noted that if the men had walked out under the mistaken impression that they had the foreman's permission, the walkout would not have been for the purpose of "mutual aid or protection." *Scott Lumber Co., Inc.*, 109 NLRB 1373, 1375 (1954).

¹² Hovis' attempt to reconcile his testimony before the Maryland Board with the testimony he wanted to give before the Trial Examiner is very revealing (R. 44-45):

"Q. Did you think that you had permission to leave? A. No.

"Q. Did you think that you — that the leader, Caron, could give you permission to leave that morning? A. No.

* * * * *

"Q. Did you testify before the Maryland Department of Employment Security on February 24, 1959? A. Yes.

* * * * *

"Q. Now, at that hearing before the Department of Employment Security, did you or did you not testify that the leader of the machine shop told you that it was too cold to work and that you were going home? A. That is right.

"Q. Did you or did you not testify that you had never questioned the authority of the leader before? A. No, I never had. I still didn't think I had permission.

"(Mr. Bair) That is not responsive.

"Q. (By Mr. Bair) Did you testify that you had never questioned Caron's authority before? A. No, I never questioned his authority.

* * * * *

"Q. Now, did you or did you not testify that you assumed that the leader was speaking for the foreman? A. Yes. I thought he was speaking for the foreman.

"Q. You did? A. Yes.

"Q. So when Caron said that Jarvis said it was too cold, if you had any guts you should go home, you thought Caron was speaking for Jarvis; right? A. Right."

The subsequent actions of the men also strongly tend to show that the walkout was a temporizing response to the cold and to the Jarvis statement and not a "strike" in protest of working conditions. The evidence clearly shows that the men did not walk out to enforce compliance with a demand or request, refusing to return unless Respondent granted some concession. It shows rather that they intended to return to their jobs the next morning in any event.

In fact, George did return to work Tuesday morning, January 6,¹³ not knowing he had been discharged (R. 36). Caron testified that as he was leaving, he said to Jarvis, "I will see you tomorrow, I am going home", receiving the reply, "Okay, Babe, I will see you tomorrow" (R. 90). Heinlein testified that "certainly" he was going to return to work the next day (R. 34). Affayroux did not even go home. He went to a nearby diner for some coffee and returned to the plant later that morning (R. 43). Adams said he went home because he was running a fever and was sick. He later obtained a doctor's certificate to substantiate the fact (R. 38). He also stated that he, too, intended to return to work the next day (R. 93).

Far from being protestants to a labor dispute, the men evidenced feelings of remorse in walking out. Affayroux, upon returning to the plant the same morning, told Tarrant he had gone to a diner for coffee because he was cold and wasn't feeling well and asked to go back to work (F. 98). He also asked Jarvis (R. 57). George told both Jarvis and Tarrant that he realized he made a serious mistake and knew he was wrong. He also wanted to be taken back (R. 56, 98). Adams told Rushton he was sorry and that he wanted to return to work (R. 57, 100).

¹³ January 6 was almost as cold and almost as windy as January 5 (See G. C. Ex. 2).

The Reasons for or Motives Behind the Discharges Were Proper, Lawful Ones, Completely Divorced from Anything Condemned by the National Labor Relations Act.

Jarvis, Wampler and Rushton discussed at length the unauthorized walkout. It was decided that the walkout could not be tolerated (R. 59, 66). The men knew that they needed the permission of their foreman to leave the plant (R. 31-32, 34, 39, 43). Yet, in violation of this plant rule (R. 66-67), a rule vitally necessary to the maintenance of plant discipline (R. 66), they walked out, not only without the permission of their foreman, but even more significantly, without asking his permission, without informing him of the action they were taking and, indeed, without discussing the matter with him in any way (R. 31, 34, 37, 39, 40, 42, 44). Not one of the men had made inquiry as to the cause of the cold condition of the plant or as to what the Company was going to do about it (R. 54). Six of the seven men had not inquired or investigated whether the main furnace in A shop was properly functioning (R. 31, 34, 36, 38, 39-40, 43). Apparently Affayroux was the only one who knew that the main furnace was not operating (R. 42). And, none of the men, not even Affayroux, talked with anyone in management, to find out what the difficulty was or what steps were being taken to correct the difficulty (R. 31, 34, 38, 39-40, 42, 43, 54, 92).

For these reasons, for walking out without asking their foreman's permission and without informing him of the action they were taking,¹⁴ the men were discharged (R. 55).

¹⁴ The Trial Examiner refers to the second reason as "an after-thought" (R. 16). There is no basis whatever in the record of this case for reaching any such conclusion and such conclusion is clearly erroneous. A reading of the testimony of Fred N. Rushton (R. 65-67; Tr. 212-218) makes it quite clear that Rushton was extremely upset because of the fact that the men walked off without even giving Jarvis an opportunity to discuss the matter with them.

59, 62, 65-66). The decision was made between 9:00 and 9:30 A.M. Jarvis was able to inform three of the men personally or by telephone and he sent telegrams to the other four (R. 15, 55).

Summary of Facts

As pointed out by the Court of Appeals (R. 116), " * * * the record here before us manifests a conspicuous and total absence of any action on the part of the employees to attempt to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company prior to the walkout." The record also shows that while the men walked out because it was cold, the walkout was neither a strike nor a work stoppage in protest of working conditions. It was precipitated by a statement of a foreman which was intended as facetious. It was engaged in by all completely without reference to a current labor dispute or a pending demand or grievance and without expressed purpose or stated objective. Management was neither consulted nor informed as to the intended action or the purpose of the walkout and had no opportunity whatsoever by negotiation or concession to avoid the walkout and thus maintain its important machine shop operation. Under the circumstances, the Company refused to condone the unilateral, precipitous action at the price of abandoning necessary plant discipline, and decided to discharge the men. It cannot be disputed that the only reason for discharging the men was to punish them for violating plant rules in leaving their jobs without permission and without informing their foreman of their intentions and that the only motive was the desire to maintain plant discipline.

*The Complaint, the Intermediate Report
and the Board's Decision and Order*

The Complaint in 5-CA-1498 charges the Respondent with interfering with, restraining and coercing its employees in the exercise of rights guaranteed by Section 7, in violation of Section 8(a)(1) of the Act and with discouraging membership in a labor organization by discrimination in regard to hire and tenure of employment, in violation of Section 8(a)(3) of the Act (R. 9). The Trial Examiner (R. 19) and the Board (R. 3) found only a violation of Section 8(a)(1), the Trial Examiner reporting: "No labor organization is alleged to be, nor was any proved to be, involved in Case No. 5-CA-1498" (R. 12). Notwithstanding this, and without a scintilla of evidence to support a "discriminatory"¹⁵ discharge or a finding of a motive to discourage concerted activities, paragraph 1(a) of the Board's Order (R. 4) would require the Respondent to cease and desist from "discouraging concerted activities of its employees by discriminatorily discharging any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment", using the language of Section 8(a)(3). No matter what the outcome of this litigation this part of the Board's Order is totally unwarranted and should be stricken.¹⁶

In finding a Section 8(a)(1) violation, the Board's cursory decision relied, "*inter alia*," upon the following (R. 3):

"the credited testimony of employee Hovis that 'We all got together and though it would be a good idea to

¹⁵ All men involved in the walkout were discharged, indiscriminately and without exception.

¹⁶ Where there is only "one item" of unfair practice, "there appears no reason for enlarging the scope of the enforcement decree beyond that feature." *National Labor Relations Board v. Crompton — Highland Mills, Inc.*, 337 U.S. 217, 226 (1949)

go home; maybe we could get some heat brought into the plant that way;" the credited testimony of employees Heinlein, Caron and George as to previous complaints made to the Respondent's foremen over the cold working conditions, and to the effect that the men left on the morning of January 5 in protest of the coldness at the plant; and the evidence that the 7 complainants left the shop approximately the same time."

The Board ordered reinstatement of the discharged employees, with back pay, finding that such action "will effectuate the policies of the Act" (R. 4). The Board, however, did not make a finding that the men were employees whose work had ceased in connection with a current labor dispute within the meaning of Sections 2(3) and 2(9); nor do the facts found by the Board or the Trial Examiner support an ultimate finding of a current labor dispute.¹¹

Neither the Trial Examiner nor the Board made proper findings upon or gave "adequate explanation of its reasons for disregarding or discrediting" the evidence of the Respondent which proved that the discharges were made for cause for reasons and motives which are in no way condemned by the Act. Respondent is entitled to such findings or explanations under Section 10(c), which deprives the Board of power to reinstate employees who are "discharged for cause".

The Decision of the Court of Appeals

The Court below properly denied enforcement of the Board's Order. It held that a summary, unilateral walk-out "without any sort of demand on the company" was

¹¹ Compare *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344, 349 (1938).

contrary to the policy of the Act and to "the fundamental purposes of collective bargaining" and hence was not an activity protected by Section 7 (R. 121-23). It implicitly recognized, by requiring "a demand or request made to the employer", that discharged economic strikers are not entitled to reinstatement unless there is a current labor dispute (R. 118). It takes two to make a fight, and the employer could not be a party to a "dispute", which it did not know existed. The employer, as much as the employees, regretted the cold condition, and had already acted to remedy it. Hence there was nothing to dispute about. The Court concluded that "the discharges were not, in any sense, discriminatory, and were not without justification" (R. 122-23).

SUMMARY OF ARGUMENT

1. Section 7 does not protect, as a concerted activity for mutual aid or protection, a walkout which is not a protest against either working conditions or an employer unfair labor practice. In this case, the facts show that the walkout occurred not as a protest against working conditions as customarily maintained by the employer, but because of the momentary exceptional, cold due to an unforeseeable misfiring of a furnace and because of the foreman's statement relayed to the men by the leader. The facts do not show that the purpose of the walkout was either for "aid" in bargaining over a labor dispute or for "protection" from an employer unfair labor practice. The pretense that a current labor dispute existed probably resulted from the Board's belief that the punishment of discharge was disproportionate to the offense, a matter over which the Board has no jurisdiction. The Board's finding that the walkout constituted an "economic strike" is not supported by substantial evidence on the record considered as a whole.

2. Under Section 10(c) of the Act, only "employees" may be reinstated. By reason of Section 2, an employee who engages in a strike over working conditions (an economic strike) remains an "employee" but only if he ceased work "as a consequence of, or in connection with, a current labor dispute." The Board made no finding that the walkout occurred in the course of a current labor dispute, as indeed it could not, for there is no evidence whatever in the record to support such a finding. Consequently, once the men were discharged by the Company, Section 2 did not operate to preserve their status as "employees", and the Board was without power to reinstate them. /

3. Under Section 10(c) of the Act, reinstatement may be ordered only if the employer commits an unfair labor practice and if reinstatement "will effectuate the policies of the Act." Reinstatement may not be ordered in the case of a discharge "for cause". Even if this Court concludes that the employees engaged in an economic strike, Section 7 does not automatically protect them from discharge.

a. The right to strike is not absolute. The right as it existed prior to the passage of the National Labor Relations Act, was neither modified nor enlarged by the Act except only in the narrow sense that the Act imposed a duty upon employers not to interfere with strikers where such interference was motivated by a desire to deprive the employees of their right under Section 7 to organize and to bargain collectively. If an employer interferes with an economic strike by way of discharge of strikers for any other motive or reason, this does not constitute an unfair labor practice, and the provision in Section 10(c) authorizing reinstatement cannot be applied.

b. Under Section 10(c) of the Act, the Board is without power to reinstate employees discharged "for cause", even

though the cause coincides with or is connected with concerted activity otherwise protected by Section 7. Here the discharges were made to punish insubordination and infraction of rules in the interest of maintaining order and discipline, reasons and motives which are not condemned either by the letter or the spirit of the Act. If the men had been discharged to make room for others to carry on the machine shop operation in the way desired by the employer and not the way being dictated by the men, such discharge for such reasons would also have been lawful and proper. Employees who engage in an economic strike are subject to the same economic risk, that of discharge, to which they were subject before the passage of the Act, so long as the employer's motives and reasons in discharging them are *bona fide* and lawful ones.

c. The rights of employees protected by Section 7 do not expressly include the right to strike, although obviously Congress could specifically and expressly have afforded such protection. Even if Congress, without saying so, meant to protect economic strikes by Section 7, the language of the statute is such that only economic strikes which are consistent with and part and parcel of the processes, practices and procedures of self-organization and collective bargaining can possibly be protected by its provisions. Reinstatement of striking employees under Section 10(c) will not "effectuate the policies of the Act" where the necessary effect of such reinstatement will be to encourage unannounced walkouts without stated purposes or objectives and thereby sanction and promote all manner of industrial strife and unrest which will surely follow all such walkouts. Reinstatement of such strikers will only undermine these policies. On the other hand, where the failure to reinstate employees will do nothing more than vindicate an employer's desire to maintain discipline and

order in the operation of its business, such a result will in no way conflict with or undermine the policies of the Act.

ARGUMENT

A.

There Is No Basis in the Record for a Finding that a Current Labor Dispute Existed, and the Board Was Without Jurisdiction to Substitute Its Judgment on the Question of Appropriate Disciplinary Measures for that of Management.

The facts show beyond peradventure of a doubt that the walk-out did not occur in the course of a current labor dispute. In this respect, this case is similiar to *National Labor Relations Board v. Sunset Minerals, Inc.*, 211 F. 2d 224 (9th Cir. 1954) and *Scott Lumber Co., Inc.*, 109 NLRB 1373, 1375 (1954).

The patent absence of any current labor dispute on that cold morning in January, 1959, when mechanical failure delayed operation of the furnace, has led Petitioner to the extreme of pretending the existence of one on the grounds of isolated, stale individual complaints about the temperature in Respondent's factory. Such scattered complaints as there were had related to the heat level under normal operating conditions, not to cold resulting from equipment failure. There was no evidence that such a failure had ever occurred before. The supposed labor dispute consisted, therefore, of nothing more than the general discontent, manifested wherever any sizeable group of humans congregate, over temperatures. To maintain a heat level uniformly satisfactory to every occupant of a space is evidently impossible. It would be no exaggeration, therefore, to say that, on the reasoning of Petitioner, in virtually every plant throughout the United States at all times a "labor dispute" on this issue is "current".

If Petitioner's position is to be considered at all, it must go so far as to say that grounds existed on January 5, 1959, which, by reason of Section 7, would have precluded discharge of the seven employees, even though the furnace had functioned properly and they had walked off the job without notice to or permission from the employer, albeit Respondent's shop had been heated to the normal temperature — a temperature sufficient to enable the men customarily to work without coats, in denim jackets. This is inescapably so because the supposed proof of a current labor dispute related exclusively to times of normal operating temperatures.

Consequently, Petitioner's position comes down to this: Whenever a concerted work stoppage occurs, with no warning to the employer, and regardless of the resulting disruption to production, so long as the reason assigned is unsatisfactory temperatures, the employer will be barred from disciplining the participants. Since proof of dissatisfaction with heat levels as strong as that in the present case can be produced for virtually every place of employment, the consequence will be a sure-fire protection from discharge for the participants in any work stoppage whatever. Such a weapon in the hand of one of the parties is not calculated to promote healthy industrial relations nor to further the aims of the National Labor Relations Act.

In reviewing the decision of the Board, it is difficult to escape the conclusion that a belief that the punishment of discharge was disproportionate to the offense led the Board to pretend the existence of a current labor dispute, when none existed. Only by doing so could it gain jurisdiction to reverse the employer's action. But Congress has never concluded that the Board should be given authority to impose its judgment as to what is appropriate discipline on the employer. Without in any way wishing to awaken

echoes of economic royalism, we respectfully suggest that it is dubious indeed that the Board's judgment in such matters will equal or be superior to that of the management, which not only has more complete knowledge of the multiple factors involved in any disciplining decision, but also has a direct responsibility, not capable of being felt by the Board, for the success of the enterprise. The point is well stated in *National Labor Relations Board v. Montgomery Ward & Co., Inc.*, 157 F. 2d 485, 490 (8th Cir. 1946), as follows:

"In considering the propriety of these discharges, the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities or affiliations of the employees."

In all events, Congress has granted no such jurisdiction, and this Court should not aid the Board in its efforts to seize such jurisdiction in the guise of a fictitious finding of an economic strike or a current labor dispute under the existing statutory language in Section 7.

B.

Use of the Dialectical Method Will Show that the Discharges Were Proper and Lawful and that the Walkout Was Not Protected by the Act.

The development of the law governing contests between employer and employee is a living illustration of the dialectical resolution of opposing social forces.

The *thesis* is the employer's "right to carry on business — be it called liberty or property",¹⁸ including the right to

¹⁸ Brandeis, J., dissenting in *Truax v. Corrigan*, 257 U.S. 312, 354 (1921).

discipline and discharge employees, to the end of increasing the production and marketing of goods and services at as low a unit cost as possible.

The *antithesis* is the employees' right to organize, to bargain collectively and ultimately to strike in order to better their wages, hours and working conditions, and their place in society.

The resultant of the contests between capital and labor, crystallized from time to time into law by judicial decision and legislation, is an ever changing thing. But the *synthesis*, the unity of these different forces, is the supremacy of the public interest, in other words public policy.¹⁹

¹⁹ *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 797 (1945) ("These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.")

National Labor Relations Board v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957) ("Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employers and employees collide. * * * The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility * * *")

Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 806 (1945). ("The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.")

Frankfurter and Greene, *THE LABOR INJUNCTION* (1930), pp. 24-25 (Quoting from Mr. Justice Holmes, as follows: "The inten-

The case at bar lends itself to dialectical analysis of the rights of the parties. The *thesis* is the employer's right to discharge employees so as to maintain plant discipline and to punish employees for walking out without notice or permission, in violation of company rules. The *antithesis* is the employees' right to engage in an unannounced economic "strike" without first stating their demands or purpose to their employer. The *synthesis* is to be found in public policy as it evolved in a series of legislative enactments, the more important being: the Erdman Act of 1898 (§ 10); the Clayton Act of 1914 (§§ 6 and 20); the Railway Labor Act of 1926 (§ 2); the Norris-LaGuardia Act of 1932 (§ 2); the National Industrial Recovery Act of 1933 (§ 7a); Public Resolution No. 44 of June 19, 1934; the Wagner Act of 1935; and the Taft-Hartley Act of 1947.²⁰

tional infliction of temporal damage is a cause of action, which, * * * requires a justification if the defendant is to escape. * * * in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed.").

See also Mr. Justice Brandeis dissenting in *Truax v. Corrigan*, 257 U.S. 312, 357 (1921) ("The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest."); and see Holmes, J., dissenting in *Vegelehn v. Guntner*, 167 Mass. 92, 44 N.E. 1077, 1081 (1896).

²⁰ Excellent discussions of the statutory evolution of collective bargaining policy are found in Bernstein, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1950); Millis and Brown, *FROM THE WAGNER ACT TO TAFT-HARTLEY* (1950); McNaughton and Lazar, *INDUSTRIAL RELATIONS AND THE GOVERNMENT* (1954). For earlier works, see Fisher, *INDUSTRIAL DISPUTES AND FEDERAL LEGISLATION* (1940); Rosenfarb, *NATIONAL LABOR POLICY AND HOW IT WORKS* (1940); Bowman, *PUBLIC CONTROL OF LABOR RELATIONS* (1942); McNaughton, *THE DEVELOPMENT OF LABOR RELATIONS LAW* (1941); Witte, *THE GOVERNMENT IN LABOR DISPUTES* (1932); Frankfurter and Greene, *THE LABOR INJUNCTION* (1930).

I.

THE THESIS — THE RIGHT TO DISCHARGE

At common law, the right of the employer to discharge its employees was complete. In the absence of a contract specifying a term of employment, the employer could discharge for any reason or for no reason. He could discharge an employee simply for belonging to a labor union or otherwise engaging in union activity.²¹ He could discharge an employee for abruptly leaving his job in disobedience of his employer's orders or rules.²² The usual contract of employment, being terminable at will, imposed no legal limitations upon the right.

Early attempts by legislatures to aid the forces of labor by passing anti-discrimination statutes in order to prevent discharge of workmen for union activity, were frustrated by decisions of the Supreme Courts of the United States and nearly a dozen states holding such legislation to be unconstitutional.²³

It was not until 1930 that this Court in upholding the constitutionality of the Railway Labor Act of 1926, imposed a significant qualification upon the previously unfettered right to discharge. In *Texas & New Orleans R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548

²¹ Witte, *THE GOVERNMENT IN LABOR DISPUTES* (1932), pp. 211-12, 302-03. *Adair v. United States*, 208 U.S. 161, 174-75 (1908); *Coppage v. Kansas*, 236 U.S. 1, 11, 12 (1915); *Platt v. Philadelphia & R.R. Co.*, 65 Fed. 660 (E.D. Pa. 1894); *Rosenihal-Ettlinger Co. v. Schlossberg*, 149 Misc. 210, 266 N.Y. Supp. 762 (Sup. Ct. 1933).

²² Laube, *The Right of an Employee Discharged for Cause*, 20 Minn. L. Rev. 597, 605-08 (1936); *Note*, 37 L.R.A. (N.S.) 950; See *Truax v. Raich*, 239 U.S. 33, 38 (1917) (an employee may be "discharged at any time for any reason or for no reason, the motive of the employer being immaterial", provided the employer's action is not because of unjustified interference of third persons.)

²³ *Adair v. United States*, *supra*; *Coppage & Kansas*, *supra*; and see cases cited in Witte, *op. cit.*, p. 212.

(1930), the Railroad, to purge itself of contempt, was ordered to reinstate certain employees who had been discharged because of union membership and union activity. This Court, in imposing limitations upon the employer's right to carry on its business, took care, however, to observe that the employer's right to discharge must give way only to the extent necessary to preserve the statutory rights of employees to be free from interference in organizational activity. Chief Justice Hughes said (p. 571):

"The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing."²⁴

Like the Railway Labor Act of 1926, the policy declaration of the Norris-LaGuardia Act, Section 7(a) of the National Industrial Recovery Act,²⁵ and the Wagner Act²⁶ did not place direct statutory limitations upon the unquestioned right to discharge. Rather, the limitations on the right in all three statutes are spelled out in identical terms which only protect employees against interference, restraint or coercion in the designation of representatives

²⁴ For a similar statement as to a state statute, see Day and Hughes, JJ., dissenting in *Coppage v. Kansas*, 236 U.S. 1, 32, 40 (1915).

²⁵ See *Rosenthal-Ettlinger Co. v. Schlossberg*, 149 Misc. 210, 266 N.Y. Supp. 762 (Sup. Ct. 1933) (holding that the N.I.R.A. did not mean that an employer could not discharge an employee "for any reason, or for no reason" or that it had the burden to show good cause other than union affiliations.)

²⁶ H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 19 reads: "Nothing in this subsection [8(3)] prohibits interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment * * * interfere with the exercise by employees of their right to organize and choose representatives."

of their own choosing or in self-organization or "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This Court has said time and again that the employer remains at liberty whenever and for whatever cause he sees fit, to discharge an employee except only as punishment for or discouragement of activities which the statutes affirmatively protect.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937):

"The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge."

Associated Press v. National Labor Relations Board, 301 U.S. 103, 132 (1937):

"The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discour-

agement of, such activities as the act declares permissible."

National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 264 (1939):

"But it does not follow because the section preserves this right to employees where they have ceased work by reason of a labor dispute or unfair labor practice, that its language is to be read as depriving the employer of his right, which the statute does not purport to withdraw, to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason — their discharge for unlawful practices which the Act does not countenance."

These unequivocal pronouncements preserving the employer's right to discharge were codified into law in 1947 when Section 10(c) of the National Labor Relations Act was amended to provide: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." The Congressional purpose behind this amendment is quite clear. House Report No. 245, 80th Cong., 1st Sess., pages 42-43, reads in part:

"Section 10(c). — This section, dealing with remedies the Board may prescribe, contains these three significant changes.

* * * * *

"C. A third change forbids the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause. In the past, the Board, admitting that an

employee was guilty of gross misconduct, nevertheless frequently reinstated him, 'inferring' that, because he was a member or an official of a union, this, not his misconduct, was the reason for his discharge.

* * * * *

"The change made in section 10(e) [sic] on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct. The bill will require that the new Board's rulings shall be consistent with what the Supreme Court said in upholding the act, that it (the act) — 'does not interfere with the normal right of the employer to select its employees or to discharge them. * * * the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than * * * intimidation and coercion.' (*Labor Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 45-46). The Board may not 'infer' an improper motive when the evidence shows cause for discipline or discharge."

House Conference Report No. 510, 80th Cong., 1st Sess., pages 38-39, 55, makes reference to the subject provision in Section 10(c) both in its discussion of the rights of employers under Section 7 as well as in its discussion of Section 10(c). The Conference Report makes it clear that concerted activity does not immunize employees from discharge and that in case of conflict between the right to engage in concerted activity and the legitimate exercise of the right to discharge for cause, the latter right predominates. Thus, at pages 38-39 the Conference Report states:

"Thus the courts have firmly established the rule that under the existing provisions of section 7 of the

National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. * * * The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N.L.R.B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

"By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

"In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.' This in and of itself demonstrates a clear intention that these *undesirable concerted activities are not to have any protection under the act*, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if

such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity." (Emphasis supplied.)

And at page 55 the Conference Report states:

"(10) The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the 'weight of evidence' language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon v. N.L.R.B.*, 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this provision is also discussed in connection with the discussion of section 7." (Emphasis supplied.)

And on page 59 of the Conference Report it is stated:

"Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for

any such reason is protected in specific terms in section 10(c)."

Considerable fear was expressed that the subject amendment to Section 10(c) would permit an employer to escape liability for the discharge of an employee for union activities on the pretext that other grounds existed to justify the discharge.²⁷ To these fears Senator Taft replied,²⁸

"If a man is discharged for cause, he cannot be reinstated. If he is discharged for union activity, he must be reinstated. In every case it is a question of fact for the Board to determine. * * * For years it has had to determine in every case whether a man was discharged for cause or for union activity. In my opinion this language in no way changes the existing provision of law, after the modification which we forced in the House provision."

1.

Of Necessity, the Employer's Motive in Exercising Its Right to Discharge Must Be Proved

Where the discharge is for reasons closely related to but separable from the concerted behavior of the employees, it has been unequivocally pointed out both by Congress²⁹ and this Court³⁰ that the concerted activity does not confer immunity from discharge even though it occurs in the course of a labor dispute. The fact that the reasons for the

²⁷ House Minority Report No. 245, 80th Cong., 1st Sess., pp. 92-93; Senator Murray, *Cong. Record*, 80th Cong., 1st Sess., pp. 6659, 6665; Senator Pepper, *Cong. Record*, 80th Cong., 1st Sess., p. 6677; President Truman's veto message, June 20, 1947, *Cong. Record*, 80th Cong., 1st Sess., p. 7501.

²⁸ *Cong. Record*, 80th Cong., 1st Sess., p. 6677.

²⁹ H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 39.

³⁰ *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 257, 264 (1949); *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464, 477-78 (1953).

discharge coincide with and stem from certain phases of the concerted activity is not at all controlling. "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Teamsters Local v. National Labor Relations Board*, 365 U.S. 667, 675 (1961). "The relevance of the motivation of the employer * * * has been consistently recognized." *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, 43 (1954).

From their earliest beginnings the National Labor Board,³¹ the old National Labor Relations Board established under Public Resolution No. 44³² and the present National Labor Relations Board operating under the Wagner Act³³ found themselves continually faced with the problem of ascertaining "true purpose" and "real motive" behind the discharge of employees.

Courts have often differed with findings of the Board to reach the conclusion that upon the evidence on the record considered as a whole, the motivation of the employer behind the discharge was not one condemned by the National Labor Relations Act.³⁴

³¹ SPENCER, COLLECTIVE BARGAINING UNDER SECTION 7(a) OF THE NATIONAL INDUSTRIAL RECOVERY ACT, University of Chicago Press (1935), pp. 73, 78. BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950), pp. 60-61.

³² BERNSTEIN, *op. cit.*, p. 85; Note, *The Decisions of the National Labor Relations Board*, 48 Harv. L. Rev. 630, 650-52 (1935); Note, *Labor Law — The Present State of Section 7(a)*, 21 Va. L. Rev. 677, 685-86 (1935).

³³ ROSENFARB, NATIONAL LABOR POLICY AND HOW IT WORKS (1940), pp. 165, 175-76; Ward, "Discrimination" Under the National Labor Relations Act, 48 Yale L.J. 1152, 1164-65, 1187-92 (1939); Daykin, *The Employer's Right to Discharge Under the Wagner Act*, 24 Iowa L. Rev. 660, 662-71 (1939).

³⁴ See e.g., *Victor Manufacturing & Gasket Co. v. National Labor Relations Board*, 174 F. 2d 867, 868 (7th Cir. 1949); *National Labor Relations Board v. Industrial Cotton Mills*, 208 F. 2d 87 (4th Cir. 1953), cert. denied, 347 U.S. 935; *Southern Oxygen Co. v. National Labor Relations Board*, 213 F. 2d 738 (4th Cir. 1954);

The Record Considered as a Whole Does Not Disclose One Scintilla of Evidence of Improper or Unlawful Motive and the Board Failed to Meet its Burden of Proof.

While recognizing that specific evidence of motive is not indispensable and that an inference of improper motive may be drawn where the foreseeable consequence of employer conduct is the discouragement of union membership or organizational activity, (*Radio Officers Union v. National Labor Relations Board*, *supra* at 45), no such consequence was possibly foreseeable in this case. The Board is entitled to draw reasonable inferences from the evidence, but it cannot create inferences where there is no substantial evidence to support them. There is no evidence in the record of any previous threats of dismissal. There is no evidence of discrimination or of any inequality of treatment of these or any other employees either as to firing or as to reinstatement. There is no evidence of a current labor dispute or of any previous attempts to organize a protest against or a voice of dissatisfaction with working conditions. The charge of discrimination under Section 8(a)(3) was not proved. The Trial Examiner stated "No labor organization is alleged to be, nor was any proved to be, involved in Case No. 5-CA-1498" (R. 12).

The burden of proving that the employer discharged the men with the conscious purpose of interfering with their rights guaranteed by Section 7 is upon the General Counsel for the Board.³⁵ In *National Labor Relations Board v. Ford*

National Labor Relations Board v. Ford Radio & Mica Corp., 258 F. 2d 457 (2nd Cir. 1958); *National Labor Relations Board v. Walton Manufacturing Co.*, 286 F. 2d 16 (5th Cir. 1961), cert. granted, 368 U.S. 810, argued, March 19, 1962.

³⁵ *National Labor Relations Board v. Rickel Bros., Inc.*, 290 F. 2d 611 (3rd Cir. 1961); *National Labor Relations Board v. Birmingham Publishing Co.*, 262 F. 2d 2 (5th Cir. 1959); *Miller Electric*

Radio & Mica Corp., 258 F. 2d 457 (2nd Cir. 1958), the court said (p. 461):

"Regardless of whatever concerted activities the employees were engaging in, if they were discharged for any other reason, the employer does not violate the Act. Thus the motivation of the employer in ordering the discharge is the crucial element in establishing a violation. [Citations omitted]. The burden is upon the General Counsel for the Board to show that the employer knew the employees were engaging in protected concerted activities and that they were discharged for engaging in such activities."

The true reasons for the discharges, nothing more, nothing less, were that the men walked off their jobs without the permission of their foreman, without informing him of the action they were taking and without giving management any notice whatsoever of the reason or purpose behind the walk-out. If there was any concerted action within the meaning of Section 7, the employer was altogether unaware of its existence. Patently, the only motive behind the employer's action was to maintain plant discipline and insure compliance with plant rules. The discharges, meted out to punish insubordination and infraction of plant rules, were made in the free exercise of the employer's traditional right to carry on its business in any manner in which it sees fit, provided only that its action be free from any motive or purpose to interfere with employee rights secured by the National Labor Relations Act.

II.

THE ANTITHESIS — THE RIGHT TO STRIKE

Until 1932, the framework of the right to strike evolved largely as a result of judicial determination by the gradual

Manufacturing Co., Inc. v. National Labor Relations Board, 265 F. 2d 225 (7th Cir. 1959); *National Labor Relations Board v. Kaiser Aluminum Chemical Corp.*, 217 F. 2d 366 (9th Cir. 1954).

process of judicial inclusion and exclusion.³⁶ Legislative attempts to enlarge the right (except those applicable to the railroad industry) had been swept aside or rendered ineffective by the courts.³⁷ From 1842 until 1932, the most that the "right to strike" meant to workmen was the right to cease work peacefully in a body for a lawful purpose without being liable for punishment for the crime of conspiracy. The right was subject to destruction and was frequently destroyed by injunction, by discharge and by other forms of employer retaliation. This fact necessitates the careful use of terminology, for a right is not a true right if it can be destroyed — it is only a privilege.³⁸ Thus as of 1932, Hohfeld would term the "right" to strike nothing more than a privilege, inasmuch as there was no correlative duty on the part of either the employer or the judicial system not to interfere therewith.

1.

The Norris-LaGuardia Act

In 1932, the right to strike took on some of the aspects of a true right in the sense that the Norris-LaGuardia Act imposed a correlative duty upon the judiciary not to interfere

³⁶ Mason, *The Right to Strike*, 77 U. Pa. L. Rev. 52 (1928); Storey, *The Right to Strike*, 32 Yale L. J. 99 (1922); Comment, "Developing Ethics" and the "Right to Strike", 32 Yale L. J. 157 (1922). Oakes, *ORGANIZED LABOR AND INDUSTRIAL CONFLICTS* (1927). Millis and Brown, *FROM THE WAGNER ACT TO THE TAFT-HARTLEY* (1950), pp. 3-18. Two landmark decisions are *Commonwealth v. Hunt*, 4 Metcalf 111 (Mass. 1842); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

³⁷ Frankfurter and Greene, *THE LABOR INJUNCTION* (1930), pp. 134-98.

³⁸ Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16 (1913); Comment, "Developing Ethics" and the "Right to Strike", 32 Yale L. J. 157 (1932). McNaughton, *THE DEVELOPMENT OF LABOR RELATIONS LAW* (1941), pp. 140-41. Hohfeld's jural opposites include right: no-right and privilege: duty. His jural correlatives include right: duty and privilege: no-right.

by injunctive process with a strike involving or growing out of a labor dispute.³⁹ In terms of correlative duties of the employer, however, the "right" was still only a privilege, for the employer remained free to interfere by discharging at will any or all participants in the strike for any reason whatever and hiring replacements in their stead.

Moreover, in attempting to give "the equality of position between the parties in which liberty of contract begins"⁴⁰ to workers by depriving employers of certain judicial remedies, the Norris-LaGuardia Act neither approved of strikes nor enlarged the right to strike.⁴¹ In a manner evincing disapproval of unilateral action analogous to the Railway Labor Act of 1926, it required that an effort be made to settle disputes by negotiation and mediation before its provisions could be availed of.⁴²

³⁹ In the absence of a "labor dispute", the Norris-LaGuardia Act does not prohibit the issuance of an injunction. 47 Stat. 70; 29 U.S.C. §§ 104, 113. See *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940); *Columbia River Packers Association, Inc. v. Hinton*, 315 U.S. 143 (1942); *Order of Railroad Telegraphers v. Chicago & North Western Ry. Co.*, 362 U.S. 330 (1960).

⁴⁰ Mr. Justice Holmes dissenting in *Coppage v. Kansas*, 236 U.S. 1, 27 (1915).

⁴¹ In the House Debates, Mr. O'Conner of New York remarked, "Personally, I believe in organized labor. Capital is organized, and labor should have the right to organize and should be protected in lawful organization. I am opposed to strikes and do not believe that this is a bill to authorize strikes." *Cong. Record*, 72nd Cong., 1st Sess., p. 5465. See also, Sen. Rep. No. 163, 72nd Cong., 1st Sess., p. 10: "The primary object of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights — to protect, first, the right of free association and, second, the right to advance the lawful object of association."

⁴² Section 8 of the Act, 29 U.S.C. § 108, denies injunctive relief to any complainant "who has failed to make every reasonable effort to settle such [labor] dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." This section was inserted in the law as "an application of two familiar maxims of equity — 'he who comes into equity must

The Railway Labor Act

In 1930 in the railroad industry only, certain rights of labor took on the aspects of true rights when this Court, in *Texas & New Orleans R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930), upheld the Railway Labor Act of 1926 and the statutory imposition of correlative duties upon railroad carriers not to interfere with "appropriate collective action" on the part of the employees in the selection of representatives "for the purpose of negotiation and conference between employers and employees." 44 Stat. 577, Section 2, Third; 45 U.S.C. § 152, Third. But these rights thus preserved by statute, did not include the absolute, uninhibited right to strike.

To the contrary, the right to strike was drastically curtailed. Section 2, First, of the Act⁴³ made it the duty of the carriers and their employees alike "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes * * *." Failing settlement by conference, the Act provided for mediation by a Board of Mediation, and, if that failed, by voluntary arbitration, and, if that failed, by conciliation through a board created by the President. The presidential emergency board was required to investi-

come with clean hands', and 'he who seeks equity must do equity'. It is surely a fair requirement that one who invokes the extraordinary jurisdiction of a court should prove that he has exhausted all reasonable means for the peaceful settlement of a labor dispute. * * *

A wise social policy may well consider the manner in which parties exercise their legal rights before putting all the coercive powers of society behind those rights." Frankfurter and Greene, *THE LABOR INJUNCTION* (1930), pp. 222-23. See also, Sen. Rep. No. 163, 72nd Cong., 1st Sess., p. 22; Senator Blaine, *Cong. Record*, 72nd Cong., 1st Sess., p. 4630; Rep. O'Connor, *Cong. Record*, 72nd Cong., 1st Sess., p. 5465.

⁴³ 44 Stat. 577, Section 2, First; 45 U.S.C. § 152, First.

gate and report within thirty days; and for thirty days after the board had made its report, "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose".⁴⁴ In other words, the right to strike was both conditioned upon and subordinated to conference, negotiation, mediation, arbitration, the creation of a presidential board, and then a sixty day waiting period. The major objective of the Act "is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee." See *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515, 547 (1937); *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

It may safely be said, without equivocation, that national policy insofar as the railroad industry is concerned is unalterably opposed to unannounced strikes engaged in without opportunity for conference or negotiation.

3.

The National Industrial Recovery Act

Returning to industry in general, the next instance of legislation which gave some meaning to the right to strike by imposing correlative duties upon employers, occurred in 1933 with the adoption of Section 7(a) of the National Industrial Recovery Act.⁴⁵ This statute, however, like those which preceded it, did not by its terms define or grant the right to strike. Borrowing its crucial language verbatim from the policy declaration (Section 2) of the Norris-LaGuardia Act,⁴⁶ Section 7(a) required employers

⁴⁴ 44 Stat. 577, Section 10; 45 U.S.C. § 160.

⁴⁵ 48 Stat. 195, 15 U.S.C. § 707(a).

⁴⁶ Section 2 of the Norris-LaGuardia Act is set forth in full in Appendix A, *infra*. It was originally drafted in the spring of 1928 by a subcommittee of the Senate Committee on Education and Labor, consisting of Professors Felix Frankfurter and Francis B. Sayre

to adopt codes of fair competition which had to provide that "employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁴⁷ Two years later

of Harvard, Professor Oliphant of Columbia, Dr. Edwin E. Witte of Wisconsin and Donald R. Richberg, principal draftsman of the Railway Labor Act of 1926 and of Section 7(a) of the National Industrial Recovery Act. See Sen. Rep. No. 163, 72nd Cong., 1st Sess., p. 3; Sen. Minority Rep. No. 1060, Pt. 2, 71st Cong., 2nd Sess., p. 5. Richberg, *THE RAINBOW* (1936), p. 52. Witte, *THE GOVERNMENT IN LABOR DISPUTES* (1932), p. 274. Commenting upon the preamble in their book *THE LABOR INJUNCTION*, Frankfurter and Greene said (p. 212): "The need for legislative assertion arises, as we have seen, from the fact that in action the courts have honored this policy more in the breach than in the observance. The new legislative exordium is doubtless also susceptible of judicial evaporation. But in its setting, the section is useful rhetoric. It is intended as an explicit avowal of the considerations moving Congressional action and, therefore, controlling any loyal application of national policy by the courts. For it is the primary function of the legislature to define public policy. Apart from policies implied in constitutional limitations, the courts express policy only when the legislature is silent or ambiguous."

⁴⁷ Section 7(a) of the National Industrial Recovery Act is set forth in full in Appendix A, *infra*. The last phrase of Section 7(a)(1) was carried over verbatim from the preamble of the Norris-LaGuardia Act upon the urging of A.F.L. President William Greene, who said, "This amendment does not include within it any form of new legislation. It is a verbatim statement taken from the declared public policy of the Government as set forth in the Norris-LaGuardia anti-injunction law, * * * Labor believes it necessary in order to confirm and emphasize the guaranty of the right of organization and of the exercise of collective bargaining."

"* * * There will be no departure from policies heretofore pursued: we are not asking that something new be incorporated, but that we lift out of that declared public policy this section and include it in this emergency legislation, for the reason that labor will then feel better satisfied that its right to organize is really guaranteed, and that it will be permitted to exercise freedom of action in that direction." *National Industrial Recovery, Hearings on H.R. 5664 before the Committee on Ways and Means, 73rd Cong., 1st Sess., p. 117.*

this language, almost without change, became Sections 7 and 8(1) of the Wagner Act. In the meantime, the right to strike received direct legislative expression for the first time.

4.

Public Resolution No. 44

In 1934, after Senator Wagner's Labor Disputes bill, Senate Bill 2926,⁴⁸ and Senator Walsh's National Industrial Adjustment bill⁴⁹ failed to pass because of the unfavorable response of both industry and labor, President Roosevelt submitted Public Resolution No. 44⁵⁰ to the Congress, in an effort to secure effective enforcement of Section 7(a) of the N.I.R.A. The Resolution would empower the President to establish a new Board with authority to investigate labor controversies and conduct representation elections. On the floor of the Senate, on motion of Senator LaFollette, Section 6 was added to the Resolution to provide "Nothing in this resolution shall prevent or impede or diminish in any way the right of employees to strike or engage in other concerted activities".⁵¹

⁴⁸ Section 303 of this bill provided, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." This language was later modified by Senator Wagner to conform to the language of the Thirteenth Amendment. Bernstein, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1950), pp. 66, 77.

⁴⁹ Section 14 of this bill replaced the language of Senator Wagner's bill protecting the right to strike with a prohibition on requiring an employee to render labor without his consent and on the issuance of injunctions to compel such service. Bernstein, *op. cit.* p. 74. Compare Section 9, Eighth of the Railway Labor Act, 45 U.S.C. § 159, Eighth, and Section 502 of the Taft-Hartley Act, 29 U.S.C. § 143.

⁵⁰ 48 Stat. 1183, 15 U.S.C. §§ 702a-702f; *Cong. Record*, 73rd Cong., 2nd Sess., pp. 12044-46.

⁵¹ Senator Walsh did not object to the Amendment, but considered it unnecessary inasmuch as the Board's authority would be severely limited, and, in fact, the language had been considered and re-

But even after the National Labor Relations Board established under Public Resolution No. 44 began to hear and decide cases of discriminatory discharge, the right to strike was hardly a true right. Board orders, like those of the National Labor Board before it, requiring reinstatement of employees, were ignored by employers with impunity.⁵² And even these orders protected strikers from discharge only in those limited cases where there was substantial evidence of discrimination. The employer's right to hire and fire was restricted only in so far as his motive was animus against unionism and union organizers. "Where a strike was caused by the employer's violation of 7(a), NLRB returned the workers to their jobs without prejudice. Where there was no such breach, strikers had no legal claim to restoration."⁵³

5.

The Wagner Act

Finally in 1935, borrowing heavily from all the above mentioned legislation, Congress passed the Wagner Act. Sections 7 and 8(1) imposed a duty upon employers not to interfere with employee rights to self-organization, to collective bargaining through representatives of their own choosing "and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 13 provided, "Nothing in this Act

jected in the drafting of the Resolution. Senator Walsh said, "There is absolutely no need of this prohibitive clause against action which would deny the right to strike, because of the fact that the Board provided for would only be empowered to investigate." Senator LaFollette, while inclined to agree, pointed to the concern of labor and noted there would be no harm in the double safeguard. Whereupon the Amendment was adopted. *Cong. Record*, 73rd Cong., 2nd Sess., pp. 12044-46.

⁵² Bernstein, *op. cit.*, pp. 62, 87.

⁵³ Bernstein, *op. cit.*, p. 85.

shall be construed so as to interfere with or impede or diminish in any way the right to strike". The words "or engage in other concerted activities" were not carried over to Section 13 from Public Resolution No. 44 manifestly because the right to engage in other concerted activities was protected by Sections 7 and 8(1) of the Act.

Section 13 was not enacted into law to protect strikers from discharge, but rather to prevent any misconception that the Wagner Act intended to substitute collective bargaining rights, procedures and remedies for and in deprivation of the right to strike. Section 7(a) of the National Industrial Recovery Act had been so construed by a lower court just prior to the time Section 13 was drafted.⁵⁴

Whether or not it was aware of the New Jersey case, the Congress did have in mind the mandatory mediation procedures set forth in the Railway Labor Act. In *American News Co.*, 55 NLRB 1302 (1944), the Board placed Section 13 in its proper perspective as follows:

"As the legislative history shows, this provision was inserted to underscore the distinction between the National Labor Relations Act and its companion legislation, the Railway Labor Act, 44 Stat. 577, as amended, which placed specific restrictions in the form of waiting periods upon strikes by railway employees. The instant case involves no question of restricting the right to strike. The sole question presented is whether or not the respondent's treatment of the strikers under the circumstances in this case was an unfair labor practice.

⁵⁴ In *Bayonne Textile Corp. v. American Federation of Silk Workers*, 114 N.J. Eq. 307, 168 Atl. 799 (1933), modified, 116 N.J. Eq. 146, 172 Atl. 551 (1934), the lower court held that the policy of the National Industrial Recovery Act and the means afforded to mediate grievances deprived employees of the right to strike against an employer operating under an approved code, saying, "Courts of equity cannot countenance strikes * * *, when no fair effort has been made to adjust alleged grievances."

In the decisions in which this Board has given affirmative relief to discharged strikers it has never relied upon Section 13, but rather upon the provisions of Section 8(1) and (3) of the Act."

And in *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), this Court said (pp. 258-59):

"Unless we read into §13 words which Congress omitted and a sense which Congress showed no intention of including, all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed."

6.

The Taft-Hartley Act

From 1935 to 1947, the exercise of the right to strike attained its full potential but it also resulted in a legislative reappraisal. Ultimately, the pendulum of public opinion swung away from the desire to equalize bargaining power by imposing duties upon employers to the desire to impose certain duties and responsibilities upon employees and their representatives as well.⁵⁵ In 1947, the Taft-Hartley Act made certain types of strikes unlawful (Sections 8(b)(4), 303 and 305) and imposed restrictions upon others (Section 8(d)).

Manifestly in the light of Sections 8(b)(4), 8(d), 303 and 305, the Taft-Hartley Act amended Section 13 of the Wagner Act so as to provide:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere

⁵⁵ See Millis and Brown, *FROM THE WAGNER ACT TO TAFT-HARTLEY* (1950), pp. 271-392.

with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.⁵⁴

Neither the Wagner Act nor the Taft-Hartley Act defined the word "strike" as such. Section 501(2) of the Taft-Hartley Act, however, did provide:

"The term 'strike' includes any strike or other concerted stoppage of work by employees (including a

⁵⁴ Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 28, states:

"Section 13 has been amended in two respects: (1) By a clause which makes clear that the Wagner Act has diminished the right to strike only to the extent specifically provided by the new amendments to the act; (2) by the addition of the words 'to affect the limitations or qualifications on that right.'

"It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives. (See *American News Co.*, 55 N.L.R.B. 1302, and *Thompson Products*, 72 N.L.R.B. 150.) The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N.L.R.B. v. Sands Manufacturing Company*, 306 U.S. 332); or in breach of some other Federal Law (*Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31); or who engage in illegal acts while on strike (*Fonsteel Metallurgical Corp. v. N.L.R.B.*, 306 U.S. 240).

"This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions."

And see H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 59:

"Section 13 of the existing National Labor Relations Act provides that nothing in the act is to be construed so as to either interfere with or impede or diminish in any way the right to strike. Under the House bill, in section 12(e), a provision was included to the effect that except as specifically provided in section 12 nothing in the act should be so construed. Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The Senate amendment also added one other important provision to this section, providing that nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right. The conference agreement adopts the provisions of the Senate amendment."

stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

It can be argued that Section 501(2) of Title V should not apply to Title I inasmuch as Title I already contains a definitions section and inasmuch as Title V incorporates as its own definitions for the purposes of the Labor Management Relations Act the Title I definitions, thereby implying that the two Titles should stand separate and apart. The brief for the Board in *National Labor Relations Board v. Insurance Agents' International Union*, October Term 1959, No. 15, pages 33 to 35, argues persuasively that Section 501(2) should not be read into Section 13 so as to afford the protection of Section 13 to slow-downs and other concerted interruptions of work; because the purpose of Section 501(2) was to bring slow-downs and partial strikes and the like within the prohibitions and penalties against strike action contained in Sections 8(b)(4) and 8(d) of the amended National Labor Relations Act and Sections 303 and 305 of the Labor Management Relations Act. If Section 502 is read in *pari materia* with these sections, the argument becomes even stronger.

This Court made reference to Section 501(2) in its consideration of Section 13 in *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 258 (1949). The majority of this Court were of the view that the *Automobile Workers* case held that Section 501(2) was only to be considered in connection with Section 8(b)(4) and not with Section 13. *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 494, n. 23 (1960). Mr. Justice Frankfurter disagreed. *Id.*, 361 U.S. at 511, n. 6.

But whether or not Section 501(2) is to be read into Section 13 is immaterial under the facts of this case for two reasons. First, as already stated, Section 13 is simply a rule of construction and does not purport to enlarge or modify the right to strike as it existed under other laws, and, Second, neither Section 13 nor Section 501(2) defines the term "strike" as such, Section 501(2) stating only what the term "includes" without defining the meaning of the term.

All accepted definitions of the term "strike"⁵⁷ require that the concerted work stoppage be preceded by a demand by the employees for some concession from their employer, or in other words, a current labor dispute. "It is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will." Restatement of Torts, Section 797, comment a. Accordingly, the walkout involved in this case is not a strike within the meaning of the language of Section 13.

⁵⁷ See Webster's, NEW INTERNATIONAL DICTIONARY (Second Edition 1959); Funk and Wagnall's, NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1959 Edition); THE OXFORD ENGLISH DICTIONARY (1933 Edition); Stroud's, JUDICIAL DICTIONARY (Third Edition 1953); Black's, LAW DICTIONARY (Fourth Edition 1951); Restatement of Torts, Section 797, comment a; Teller, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940), Section 78; *Jeffrey-DelWitt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134, 138-39 (4th Cir. 1937), cert. denied, 302 U.S. 731; *C. G. Conn. Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *National Labor Relations Board v. Illinois Bell Telephone Co.*, 189 F. 2d 124, 127 (7th Cir. 1951), cert. denied, 342 U.S. 885; *Sandoral v. Industrial Commission*, 110 Colo. 108, 130 P. 2d 930 (1942). The definitions of the term "strike" are fully set forth in Appendix B, *infra*.

The Walkout Did Not Occur in the Course of A Current Labor Dispute and Hence Was Neither A Strike Nor A Protected Concerted Activity. Under Such Circumstances, Section 2(3) Is Inapplicable.

The same equation, i.e., a strike equals a work stoppage plus a current labor dispute, is to be found in Sections 2(3) and 2(9) of the Act, discussed below, which require the existence of a current labor dispute before concerted activity can be protected by way of reinstatement of discharged strikers. The holding in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), which invoked Section 7 to protect a strike as concerted activity, was necessarily based on the existence of a current labor dispute. This Court said (p. 344):

"Under the findings the strike was a consequence of, or in connection with, a current labor dispute as defined in § 2(9) of the Act. * * * there were pending negotiations for the execution of a contract touching wages and terms and conditions of employment. * * * within the intent of the Act there was an existing labor dispute in connection with which the strike was called."

In *National Labor Relations Board v. Jamestown Veneer & Plywood Corp.*, 194 F. 2d 192 (2nd Cir. 1952), certain employees who petulantly walked out in protest of a short two and one-half hour notice of a lay-off, were denied the protection of Section 7, the court saying (p. 194):

"There was no labor dispute pending as to how long a lay-off notice should be. The four employees who quit were provoked at the shortness of the notice. Their leaving had nothing to do with 'collective bargaining or other mutual aid or protection' either present or future so far as appears."⁵⁸

⁵⁸ See also, *National Labor Relations Board v. Massey-Gin & Machine Works, Inc.*, 78 NLRB 189, enforcement denied, 173 F. 2d

In the case at bar the men were not disputing with anybody prior to their walkout. There must be disputants before there can be a labor dispute, just as there must be two parties to a bargain or negotiations for a bargain before there can be a duty to bargain. See *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297 (1939).⁵⁹ Similarly, there can be no dispute when there is nothing over which the parties disagree. The employer, as fervently as the employees, wanted the cold condition, which resulted from mechanical failure, corrected.

758 (5th Cir. 1949), cert. denied, 338 U.S. 910; *National Labor Relations Board v. Reynolds International Pen Co.*, 162 F. 2d 680, 684 (7th Cir. 1947) ("Moreover, assuming the validity of the Board's finding that the walkout was attributable to rumors of a wage decrease, we still think it was unauthorized. It must be kept in mind that at the time of the walkout no demand had been made upon management concerning wages and no bargaining in reference thereto had been undertaken or suggested. In fact, there was no existing labor dispute or controversy of any character."); *National Labor Relations Board v. Sunset Minerals, Inc.*, 211 F. 2d 224 (9th Cir. 1954); *National Labor Relations Board v. Office Towel Supply Co., Inc.*, 201 F. 2d 838 (2nd Cir. 1952) (mere griping or grouching is far too "inchoate" an activity to be protected by Section 7); *Terri Lee, Inc.*, 107 NLRB 560, 562 (1953), (a walkout without permission "without any purpose thereby of protesting * * * or of seeking any concession" is not protected).

⁵⁹ "Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer — when he has not refused to receive communications from his employees — without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.

"However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining, and that he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees, without violation of law and without suffering the drastic consequences which violation may en-

We agree with that part of Judge Sobeloff's dissent (R. 125) to the effect that advance notice of a strike or the lack of it is not crucial or material, so long as it is a full strike not a partial strike.⁶⁰ It is not advance notice, but the existence of a current labor dispute that is all important if the employees are to preserve rights to reinstatement under the Act.

The Petitioner's argument (Brief, pp. 18-19) that Section 7 should be construed to protect a walkout engaged in without advance notice where a working condition suddenly becomes intolerable is not persuasive. In the first place, the Board expressly found that in this case the working conditions were not intolerable (R. 3, p. 2). Secondly, a walkout by workers to protect themselves from intolerable conditions is expressly protected, not by Section 7, but by Section 502 (29 U.S.C. § 143); and such

tail. To put the employer in default here the employees must at least have signified to respondent their desire to negotiate." *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297-98 (1939).

⁶⁰ It has been suggested that in the case of "hit-and-run" or "quickie" strikes, notice should be required to be given to the employer so as to give the employer the opportunity to require of his employees (1) uninterrupted work, or (2) a full strike, the latter which would enable him to replace workers and thus carry on his business. Comment, *The Partial Strike*, 21 U. of Chi. L. Rev. 765 (1954). This is but a refinement of settled law that employees cannot work and strike at the same time nor fix the hours of or the terms and conditions affecting their employment. *C. & G. Conn. Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *National Labor Relations Board v. Condenser Corporation of America*, 128 F. 2d 67, 77 (3rd Cir. 1942); *National Labor Relations Board v. Montgomery Ward & Co., Inc.*, 157 F. 2d 486, 496 (8th Cir. 1946); *Hoover Co. v. National Labor Relations Board*, 191 F. 2d 380, 389 (6th Cir. 1951); *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111, 113-14 (2nd Cir. 1952), *affirmed*, 345 U.S. 71 (1953); *Home Beneficial Life Insurance Co., Inc. v. National Labor Relations Board*, 159 F. 2d 280, 286 (4th Cir. 1947), *cert. denied*, 332 U.S. 758; *National Labor Relations Board v. Kohler Company*, 220 F. 2d 3, 11 (7th Cir. 1955).

protection will be afforded employees under Section 502 even if the walkout is in violation of a no-strike clause in a contract. *National Labor Relations Board v. Knight Morley Corp.*, 251 F. 2d 753 (6th Cir. 1957), cert. denied, 357 U.S. 927.

Petitioner's brief has not cited a single case in which an unannounced walkout was protected by Section 7 in which there was not also a current labor dispute. The cases of *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (6th Cir. 1953), rehearing denied, 210 F. 2d 824 (6th Cir. 1954), cert. denied, 347 U.S. 976; *National Labor Relations Board v. Solo Cup Co.*, 237 F. 2d 521 (8th Cir. 1956); and *National Labor Relations Board v. Kennametal, Inc.*, 182 F. 2d 817 (3rd Cir. 1950), and the others cited by Petitioner, were clearly distinguished by the court below (R. 120, n. 10). Each of them featured some employee protest or demand or some labor dispute to which the employer was a party.

8.

Even If It Occurs In The Course Of A Labor Dispute, An Unannounced Walkout Without Stated Purpose Or Objective Is Not Protected By Section 7. Public Policy Requires That An Economic Strike Be Preceded By Some Attempt To Settle The Dispute By Conference Or Negotiation.

Both Senator Wagner, prior to the passage of the Wagner Act, and Senator Taft, prior to the passage of the Taft-Hartley Act, made it quite clear that, while the underlying policy of the respective laws being proposed by them was not to outlaw strikes, it was hoped that the laws would eliminate strikes except as a last resort after conference and mediation had been tried without success. Senator Wagner, discussing Section 7(a) of the N.I.R.A. when

interviewed by S. J. Woolf, Chairman of the National Labor Board, said:

"The strike as a first resort is not prohibited by law; it is banned by common sense. * * *

"A great deal of confusion has been caused by those who say that workmen have been denied this right or who say that the strike has been outlawed. The strike is no more illegal than action of an employer in closing down his plant. Either may be justified. But neither should be resorted to without the seeking first of other means toward the amicable settlement of disputes." *New York Times, November 12, 1933, Sec. VI, p. 6.*

And on the floor of the Senate on April 23, 1947, Senator Taft said:

"Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. * * *

"So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions *after proper opportunity for mediation.*" *Cong. Record, 80th Cong., 1st Sess., p. 3951.*

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), this Court said (p. 42):

"Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. *Refusal to confer and negotiate has been one of the most prolific causes of strife.* This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." (Emphasis supplied.)

In keeping with these pronouncements and for the reasons set forth at length in Part III of this Argument, *infra*, the courts and the Board as well have not granted immunity from discharge to employees who engage in walkouts without notice and without stating the purposes or objectives of such, whether or not there is a current labor dispute.⁶¹

Petitioner's argument (Brief, pp. 14-15) that Section 7 protects all concerted activity unless it is either "unlawful" or "plainly indefensible by all accepted standards of conduct", is not borne out by the decided cases.⁶² To the contrary, the Act contains no such language and imposes no such standards; and the House Conference Report No. 510, 80th Cong., 1st Sess., pp. 39, 59, by using such words as "undesirable concerted activities" and "improper conduct",

⁶¹ *Automobile Workers v. National Labor Relations Board*, 336 U.S. 245 (1949); *National Labor Relations Board v. Ford Radio & Mica Corp.*, 258 F. 2d 457 (2nd Cir. 1958); *National Labor Relations Board v. Massey Gin & Machine Works, Inc.*, 173 F. 2d 758 (5th Cir. 1949), *cert. denied*, 338 U.S. 910 (denying enforcement to 78 NLRB 189 (1948)); *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 483, n. 6 (1960) (dictum); *Textile Workers Union of America v. National Labor Relations Board*, 227 F. 2d 409, 410 (D.C. Cir. 1955) (dictum), *cert. vacated*, 352 U.S. 864; *Personal Products Corporation*, 108 NLRB 743 (1954); *Valley City Furniture Company*, 110 NLRB 1589 (1954); *Pacific Telephone and Telegraph Company*, 107 NLRB 1547 (1954); *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB 1806 (1954).

⁶² See cases cited in footnotes 58, 60 and 61, *supra*. See also *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953); *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 345 U.S. 71 (1953); *National Labor Relations Board v. Jamestown Veneer & Plywood Corp.*, 194 F. 2d 192 (2nd Cir. 1952). See also, Gregory, *Unprotected Activity and the NLRA*, 39 Va. L. Rev. 421 (1953); Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319 (1951); Kelsey, *Partial Strikes*, 6 N.Y.U. Ann. Lab. Conf. 281 (1953); Mittenenthal, *Partial Strikes and National Labor Policy*, 54 Mich. L. Rev. 71 (1955); Green, *Employer Responses to Partial Strikes: A Dilemma?*, 39 Tex. L. Rev. 198 (1960).

indicates an intention to deny statutory protection to employees where their conduct, although perfectly lawful, is inconsistent with and not sanctioned by the fundamental purposes and policies of the Act.

9.

Economic Strikers Are Not Immune From Discharge

In *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926), Mr. Justice Brandeis said, "Neither the common law, nor the Fourteenth Amendment confers the absolute right to strike." The same can be said for the National Labor Relations Act. An economic strike to better working conditions remains only a partial right. It is protected from destruction by injunction by the Norris-LaGuardia Act. It is protected from destruction by way of discharge or other discrimination by the National Labor Relations Act only in those specific instances where the discharge or discrimination interferes with efforts towards self-organization and collective bargaining.

Neither Section 7 nor Section 13 precludes the employer from taking action of his own for reasons not condemned by the Act. He can discharge for cause. *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953); *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 483 (1960) (dictum). He can lock out employees in economic retaliation. *National Labor Relations Board v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957). He can effectively discharge or lock out striking employees by hiring replacements to take over their jobs. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *National Labor Board v. Sands Manufacturing Co.*, 306 U.S. 332 (1939).

Thus the right to strike, when exercised, is still accompanied by the same economic risk — discharge — which was present before the Act. Drinker, *The Right to Discharge for "Union Activity"*, 88 U. of Pa. L. Rev. 806 (1940). The limits of its protection are spelled out by Sections 7 and 8(a)(1) of the Act, as amended. In ascertaining these limits, guidance is to be had in both the rules of interpretation and procedural limitations found in Sections 1, 2(3), 2(9), 10(c) and 13. A review of the public policy underlying these statutory provisions affords the proper synthesis.

III.

THE SYNTHESIS — PUBLIC POLICY

To strike a proper balance of the conflicting legitimate rights of employees and employers, we must strive to clearly ascertain our national labor policy. This public policy has received considerable statutory expression⁶² in

⁶² A succinct yet complete expression by this Court of the underlying policy of the Act and of the fundamental rights being protected by it appears in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 182-83 (1941):

"Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was 'to eliminate the causes of certain substantial obstructions to the free flow of commerce.' This vital national purpose was to be accomplished 'by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association.' § 1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. 'The Act', this Court has said, 'does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.' But 'under cover of that right, the employer may not 'intimidate or coerce its employees with respect to their self-organization and representation.' When 'employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for contro-

the Wagner Act and in the Taft-Hartley Amendments to the Act. See 29 U.S.C. §§ 141(b), 151, 171(a), Appendix A, *infra*, pp. 72-73, 75-76.

The first paragraph of Section 1 of the Act, as amended, finds that the refusal by some employers to permit and recognize the right of employees to act collectively is a major cause of strikes which in turn obstruct commerce in four specified ways.

The second paragraph of Section 1 reiterates the same thought, omitting "strike" as the immediate cause of the burden to commerce and attributing this directly to inequality of bargaining power between employees and employer.

The third paragraph states that the flow of commerce will be promoted and sources of industrial strife [strikes] will be removed by protecting the right of employees to organize and bargain collectively, "by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions", and by restoring equality of bargaining power.

versy in respect to the free and appropriate exercise of the right of selection and discharge.' *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45, 46. This is so because of the nature of modern industrialism. Labor unions were organized 'out of the necessities of the situation . . . Union was essential to give laborers opportunity to deal on equality with their employer.' Such was the view, on behalf of the Court, of Chief Justice Taft, *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209, after his unique practical experience with the causes of industrial unrest as co-chairman of the National War Labor Board. And the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free." See also, Sen. Rep. No. 573, 74th Cong., 1st Sess., pp. 1-5; H. R. Rep. No. 1147, 74th Cong., 1st Sess., pp. 8-9.

The fourth paragraph, added by Taft-Hartley, states that certain practices by some labor organizations also "burden and obstruct commerce "through strikes and other forms of industrial unrest or through concerted activities."

Finally, the fifth paragraph of Section 1 states the policy of the United States is to eliminate and mitigate these obstructions and their causes by encouraging "the practice and procedure of collective bargaining" and by protecting the right of the employees to organize as they choose, "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The purpose of the Act is manifestly to encourage and promote collective bargaining by restoring and maintaining equality of bargaining power and thereby eliminate industrial unrest and strife, i.e., strikes. This is done primarily by imposing a duty upon the employer to recognize the employee's right to organize and bargain collectively through representatives of their own choosing.

There is no intimation whatever of a purpose to support or encourage employees, whose employer is in good faith ready to negotiate over working conditions, to take the law into their own hands and resort to "strikes and other forms of industrial strife," which paragraph one of Section I specifically designates as the burden upon commerce sought to be prevented.

In the context of these declared findings and policy, we must construe Section 7 and 8(a)(1), deriving assistance from Section 2, defining the terms "employee" and "labor dispute", Section 13, preserving the "right to strike", and Section 10(c), giving the Board power to reinstate "employees" with or without back pay in order to "effectuate the policies of this Act" while at the same time denying the Board power to reinstate employees discharged "for cause."

Section 7 of the Act

Section 7 gives five rights, the fifth one being added by Taft-Hartley, viz.: (1) to self-organization, (2) to form, join or assist labor organizations, (3) to bargain collectively through representatives of their own choosing, (4) to engage in other concerted activities "for the purpose of collective bargaining or other mutual aid or protection," and (5) the right to refrain from any such activities.

Clearly the first four rights are not given for all purposes but solely for the purpose of "collective bargaining or other mutual aid or protection." Nowhere is the right to strike spelled out although obviously it could have been. Under Section 7, employees can only claim the right to engage in (1) constructive concerted activities directed towards negotiation and bargaining over working conditions, or (2) defensive activities such as a defensive strike to protect themselves from unfair labor practices of an employer.

That Section 7 does not protect an unannounced economic strike without stated purpose or objective, but only constructive concerted activity by way of negotiation or collective bargaining, is fully confirmed not only by the policy expressed in Section 1 of the Act but by the use of the word "other" in Section 7. "Other" refers back to "collective bargaining." By familiar principles of statutory construction "other" limits what follows to activities of the same nature as collective bargaining. Collective bargaining is essentially a constructive, peaceful activity, and industrial peace is the purpose of the Act.

Compare the phrase in the fourth paragraph of Section 1 where strikes "or" concerted activities are mentioned in the disjunctive. Section 7, too, could have referred to "strikes or concerted activities" but it did not do so.

Compare further the phrase in paragraph five of Section 1, where it is said that the policy of the United States is to encourage "the practice and procedure of collective bargaining" and to protect the right of the workers to organize "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Here the word "other" refers back to "negotiating" and here again the right to mutual aid or protection being recognized is the right to engage in constructive negotiation and collective bargaining not strikes.

We recognize that a potential economic strike is "a conventional factor in the collective-bargaining process,"⁶¹ but such a strike is protected by Sections 2(3), 10(c) and 13, not by Section 7.

It should be noted once again that the LaFollette amendment to Public Resolution No. 44 referred both to the right to strike or to engage in other concerted activities. The Wagner Act carried over into Section 13 only that language referring to the right to strike, protecting other concerted activities by Sections 7 and 8(1). If Congress really had intended Section 7 to include and protect the right to strike, it would not have enacted Section 13, for the language of Section 13 would have been wholly superfluous.

2.

Sections 2(3) and 2(9) of the Act

Turning to Sections 2(3) and 2(9), the obvious primary purpose of Congress is to provide by these definitions that workers should not lose the right to organize and to bargain collectively as recognized by the Act merely because they

⁶¹ *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282, 298 (1957) (Frankfurter, J., concurring in part and dissenting in part.)

have temporarily stopped work either by reason of a current labor dispute or as a defense against an unfair labor practice.⁴⁵ In conjunction with Section 10(c), these definitions protect the employees' right to be reinstated with or without back pay if the Board finds they have been the victims of an unfair labor practice and that such reinstatement is necessary to protect their right to self-organization and collective bargaining. These definitions likewise preserve the reinstatement rights of employees engaged in an economic strike, but only if it is engaged in "as a consequence of, or in connection with, any current labor dispute." It is noteworthy, also, that while Section 2(3) preserves reinstatement rights of economic strikers, it does not guarantee them in all events.

Given an economic strike in the course of a current labor dispute, Section 2(3) does not render the employer powerless to sever the employee-employer relationship by discharge for cause. If Section 2(3) is construed to mean

⁴⁵ Sen. Rep. No. 573, 74th Cong., 1st Sess., pp. 6-7, provides:

"The term 'employee' also includes any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, who has not attained any other regular or substantially equivalent employment. The bill thus observes the principle that men do not lose their right only to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy. Recognition that strikers may retain their status as employees has frequently occurred in judicial decisions. (See, for example, *Michaelson v. United States* (291 Fed. 940), reversed on other grounds in 266 U.S. 42.) To hold otherwise for the purposes of this bill would be to withdraw the Government from the field at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point. And to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby." (Emphasis supplied).

that the employee relationship must be held in *status quo* without regard to any event separable from the mere act of ceasing to work, "the right of the employer to select and discharge his employees (*National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra*), which still exists in absence of intimidation or coercion in violation of statute, would be cut off." *National Labor Relations Board v. Sands Mfg. Co.*, 96 F. 2d 721, 726 (6th Cir. 1938), *affirmed*, 306 U.S. 332 (1939). Where the "cause" is separable from the concerted activity, Section 2(3) does not avail and it matters not that the occurrence was connected with a current labor dispute. *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 346 U.S. 464, 476-78 (1953).

3.

The Act Does not Distinguish Between Discharge and Replacement. An Employer May Either Discharge or Replace Striking Employees If Its Motives are Lawful and Proper.

Manifestly, if the Act was intended to preclude the employer from interfering with an economic strike in any way, the most obvious right to take away from the employer would be the right to hire replacements. This, of course, would place the employer wholly at the mercy of the strikers, and workers naturally would use the strike weapon more and more to gain their ends. The resultant increase of strikes would increase burdens on commerce not diminish them. No such unbalanced positioning of economic power was ever intended by the Act. Early in the history of the Act, the employer's right to hire replacements for strikers was expressly affirmed. *National Labor Relations Board v. Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1938). And in recent years, the employer's right to

discharge strikers for valid reasons even prior to hiring replacements has finally been sustained.

Many decisions relying on the *Mackay* case erroneously drew a distinction between replacement of striking employees and an outright discharge of striking employees prior to their unconditional offer to return to work.⁶⁶ But this Court has never drawn any such distinction. In the *Mackay* case, the Board took three different positions. It first charged the employer with discrimination in discharging the five men. Later, it withdrew this charge and asserted that the discrimination was the refusal to re-employ the five men. Finally, it reverted to the position that it was not a failure to employ but a wrongful discharge which violated the Act. This Court waived aside such highly technical positions, saying (304 U.S. at 349):

"All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged union activities. If there was a current labor dispute the men were still employees by virtue of § 2(3), and the refusal to let them work was a discharge." (Emphasis supplied.)

In *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332 (1939), this Court implied that the employer was at liberty either to replace or discharge men who refused to work in breach of their contract, saying (p. 344):

"It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any

⁶⁶ See e.g., *National Labor Relations Board v. United States Cold Storage Corp.*, 203 F. 2d 924, 927 (5th Cir. 1953), cert. denied, 346 U.S. 818, *National Labor Relations Board v. Globe Wireless Limited*, 193 F. 2d 748, 750 (9th Cir. 1951) (and cases there cited).

more than it prohibits such *discharge* for a tort committed against the employer." (Emphasis supplied.)

As in the *Sands* case, in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), this Court said nothing to warrant drawing a distinction between discharge and replacement of strikers. If Congress meant to continue an employee status, despite discharge for cause, by virtue of the definition in Section 2(3), this Court hinted that such a statute would be unconstitutional. But this Court avoided the constitutional question by finding complete absence of legislative intention, saying (p. 255):

"We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, — to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work."

In a concurring opinion, Mr. Justice Stone noted that Senate Committee Report No. 573, 74th Cong., 1st Sess., referred to Section 2(3) as observing the principle that men do not lose their employee status "merely by collectively refraining from work during the course of labor controversy." Mr. Justice Stone said (306 U.S. at 264-65) that it does not follow that the language of Section 2(3)—

"is to be read as depriving the employer of his right, which the statute does not purport to withdraw, to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices. * * * I cannot attribute to Congress in the adoption of § 2(3), explained as it was in the Senate Committee Report, a purpose to cut off the right of an employer to discharge employees who have destroyed his factory and to refuse to reemploy them, if that is the real reason for his action."

The question was directly considered in *National Labor Relations Board v. Rockaway News Supply Co., Inc.*, 197 F. 2d 111, 115 (2nd Cir. 1952), *affirmed*, 345 U.S. 71 (1953). The Second Circuit had said that the Board was being "wholly unrealistic" in the distinction which it sought to make between the discharge of the employee and the suggested replacement of him as a striker. This Court agreed, saying (p. 75):

"The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *Labor Board v. Mackay Co.*, 304 U.S. 333, 347. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by a new employee or by transfer of duties of some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.

"In this case there is no finding, evidence or even charge that the dismissal of Waugh resulted from anti-union bias, or was intended to or did discriminate against him to discourage membership in a labor organization."

4.

Section 10(c) of the Act

The correctness of the above quoted dictum in *Rockaway News* is confirmed by reference to Section 10(c). The power of the Board to order reinstatement under Section 10(c) is dependent upon its finding that an unfair labor practice has been committed. Since by hypothesis an economic strike is not caused by and is not a consequence of an unfair labor practice, it becomes crucial to the reinstatement of an economic striker to inquire, not whether he was

discharged instead of replaced, but whether the discharge (or the replacement and refusal to rehire) was motivated by the employer's desire to interfere with employee's right to organize and bargain collectively. If the discharge was for cause, as spelled out in other language in Section 10(c), then there is no unfair labor practice, and hence the power to reinstate is completely lacking.

Section 10(c) also limits the reinstatement power by requiring a finding that reinstatement "will effectuate the policies of this Act." It may be asked, what policy will be effectuated by reinstatement of the employees in this case? What employee activity will be encouraged? What employer activity condemned by the Act will be discouraged. The Board made no findings which would serve to answer these questions. It should have done so. See *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197 (1941). It is submitted that the syllogistic findings of an economic strike and a discharge do not automatically confer power to order reinstatement. Reinstatement of the employees in this case can only encourage irresponsible unilateral strike action which the Act seeks not to encourage but to prevent. Reinstatement cannot possibly encourage negotiation and collective bargaining in the interests of industrial peace which the Act seeks to promote. It can only discourage legitimate employer concern with the maintenance of order and discipline among its employees, a concern which is essential to the continued productive operation of its business and with which the Act does not pretend to interfere.

CONCLUSION

In his book, *THE RAINBOW* (1936), Donald R. Richberg said (pp. 62-63, 69):

"We said: 'The purposes and policies of the Recovery Administration are not directed toward aiding either

side in a civil war to achieve another costly and temporary victory. We are not fighting the battles of capital or labor. We are seeking not only to build up a machinery of cooperation, but to do that which may be more important and lasting: We are seeking to create self-interest in cooperation, to demonstrate to employers and employees alike that they have more to gain in common counsel and united action than in contests of brute strength and economic power."

* * *

"* * * Yet the process of eliminating the causes of such conflicts involves an assertion of the supremacy of the public interest which can only be maintained through substituting for many exercises of individual liberty legal obligations to serve the general welfare. To impose such obligations and yet retain individual liberty and the freedom of private enterprise requires us to answer a very difficult question: Where shall we draw the line between necessary social discipline and offensive regimentation?

"There is one definite clue that we can follow in seeking to answer this puzzling question. We can set ourselves firmly against the establishment of an unbalanced, irresponsible authority in any social class, or in the government itself."

For all the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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March 30, 1962.

APPENDIX A

STATUTES INVOLVED

Section 2 of the Norris-LaGuardia Anti-Injunction Act (47 Stat. 70, 29 U.S.C. §102) is as follows:

Section 2. Public policy in labor matters declared.

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Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 7(a) of the National Industrial Recovery Act (48 Stat. 195, 15 U.S.C. §707(a)) is as follows:

Section 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or

in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

The pertinent provisions of the National Labor Relations Act, as amended, (49 Stat. 449, 61 Stat. 136, 29 U.S.C. §151, et seq.) are as follows:

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection

with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

Section 10. (c) * * *

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

The pertinent provisions of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. § 141, *et seq.*) are as follows:

Section 1. (b) * * *

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to

protect the rights of the public in connection with labor disputes affecting commerce (29 U.S.C. §141(b)).

Section 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees (29 U.S.C. §171(a)).

Section 501. When used in this Act—

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees (29 U.S.C. §142(2)).

Section 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent * * *; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act (29 U.S.C. §143).

APPENDIX B

DEFINITIONS OF THE TERM "STRIKE"

Webster's, *New International Dictionary* (Second Edition 1959):

"Strike. * * * 7. Act of quitting work; specif., such an act done by mutual understanding by a body of

workmen as a means of enforcing compliance with demands made on their employer; a stopping of work by workmen in order to obtain or resist a change in conditions of employment."

Funk & Wagnall's New Standard Dictionary of the English Language (1959 Edition):

"Strike. * * * 12. To quit or cease, as work, in order to compel compliance with a demand, redress a grievance, etc."

The Oxford English Dictionary (1933 Edition):

"Strike. * * * 9. A concerted cessation of work on the part of a body of workers, for the purpose of obtaining some concession from the employer or employers."

Stroud's Judicial Dictionary (Third Edition 1953):

"Strike. (1) "There is no authority which gives a legal definition of the word "strike"; but I conceive the word means a refusal by the whole body of workmen to work for their employers, in consequence of either a refusal by the employers of the workmen's demand for an increase of wages, or of a refusal by the workmen to accept a diminution of wages when proposed by their employers' (per Kelly, C.B., *King v. Parker*, 34 L.T. 899), or, *semble*, such a refusal in consequence of any dispute between masters and men relating to the employment; in short, 'a "strike" is properly defined as a simultaneous cessation of work on the part of the workmen' (per Hannen, J., *Farrer v. Close*, L.R. 4 Q.B. 612.)"

Black's Law Dictionary (Fourth Edition 1951):

"Strike. The act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused."

The Restatement of Torts, §797, comment a:

"a. *Definition of strike.* A strike is a concerted refusal by employees to do any work for their employer, or to work at their customary rate of speed, until the object of the strike is attained, that is, until the employer grants the concession demanded. * * * [I]t is not a strike if employees temporarily stop work without making a demand upon the employer or using the stoppage as a means of exacting a concession from him, even if the stoppage is against his will." (Emphasis supplied).

Teller, *Labor Disputes and Collective Bargaining* (1940), Section 78:

"The word 'strike' in its broad significance has reference to a dispute between an employer and his workers, in the course of which there is a concerted suspension of employment. * * *

"The outstanding characteristics of the strike as that term is employed in modern times are four: first * * *

"Third, the existence of a dispute between the parties and the utilization by labor of the weapon of concerted refusal to continue to work, as the method of persuading or coercing compliance with the workingmen's demands."

Jeffery-DeWitt Insulator Co. v. National Labor Relations Board, 91 F. 2d 134, 138 (4th Cir. 1937), cert. denied, 302 U.S. 731:

"A 'strike', in such common acceptance, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused." (Emphasis supplied.)

National Labor Relations Board v. Illinois Bell Telephone Co., 342 U.S. 885; and *C. G. Conn, Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939):

"The term 'strike' is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a *demand* for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted." (Emphasis supplied.)

Sandoval v. Industrial Commission, 110 Colo. 108, 130 P. 2d 930 (1942):

"A strike possesses at least four ingredients other than the suspended employer-employee relationship which has been mentioned, namely: (1) a *demand* for some concession, generally for a modification of conditions of labor or rates of pay; (2) a refusal to work, with intent to bring about compliance with the demand; (3) an intention to return to work when compliance is accomplished * * * (Emphasis supplied.)